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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellees*

On Appeal From the United States District Court for the Northern District of Alabama

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JURISDICTIONAL STATEMENT

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On Appeal From the United States District Court for the Northern District of Alabama

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JURISDICTIONAL STATEMENT

Floyd & Beasley Transfer Co., Inc. (F & B) appeals from the judgment of the United States District Court for the Northern District of Alabama, entered June 24, 1966, dismissing a complaint to set aside orders of the Interstate Commerce Commission. F & B submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS

The per curiam opinion of the three-judge District Court, entered on June 24, 1966, is reported at 256 F. Supp. 23. The opinion and judgment of the District Court are printed as Appendix A. The report and recommended order of the Examiner for the Interstate Commerce Commission, served September 28, 1964, is printed as Appendix B. The report of the Interstate Commerce Commission, Division 1, decided March 11, 1965, is reported at 98 M.C.C. 304 and printed as Appendix C. The unreported order of the Commission, Division 1 acting as an Appellate Division, dated March 31, 1965, reopening the proceeding on its own motion for reconsideration on the existing record, is printed as Appendix D. The unreported Order of the Commission, Division 1 Acting as Appellate Division, dated July 14, 1965, denying the petition of F & B to reopen the proceeding for further hearing, is printed as Appendix E. The report of the Commission, Division 1, Acting as an Appellate Division, dated July 14, 1965, is reported at 99 M.C.C. 258, and printed as Appendix F. The unreported order of the Commission, Division 1, Acting as an Appellate Division, dated November 12, 1965, denying further hearing and reconsideration, is printed as Appendix G.

JURISDICTION

This action was brought under 28 U.S.C. Sections 1336 and 2321-2325 to set aside orders of the Commission entered under Section 207(a) of the Interstate Commerce Act, 49 U.S.C. Section 307(a) in accord with procedure prescribed in Section 17(5-10) of the Interstate Commerce Act 49 U.S.C. Section 17(5-10). Twenty-six shippers intervened as parties plaintiff-

Parker Fertilizer Company, of Sylacauga, Alabama, Sylacauga Auto Parts Company, of Sylacauga, Alabama, Campbell Auto Parts Company, of Childersburg, Alabama, Marble City Broadcasting Company, Inc. (WMLS Radio) of Sylacauga, Alabama, Joe Dark, doing business as Modern Cleaners and Dark's Dairy, of Sylacauga, Alabama, Avondale Mills, Inc., of Sylacauga, Alabama, Sylacauga Motor Car Company, of Sylacauga, Alabama, Alabama Marble Company, Division of Georgia Marble Company, of Sylacauga, Alabama, Coosa Motor Company, of Childersburg, Alabama, Talledega Hardware Company, of Talladega, Alabama, Danville Yarn Mills, of Bon Aire, Alabama, Cooley Motor Company, of Talladega, Alabama, Talladega Machinery and Supply Company and Talladega Foundry and Machine Company, both of Talledega, Alabama, Sarvis Hardware Company, of Sylacauga, Alabama, L. M. Payne, Jr., doing business as Payne L. P. Gas Company and Payne Gulf Oil Products, both of Talladega, Alabama, Southern Alloy Corporation, of Sylacauga, Alabama, Dixie Color Printing Company, of Sylacauga, Alabama, Hill Radio & TV Company, of Sylacauga, Alabama, Plantation Patterns, Inc., of Birmingham, Alabama, The Okonite Company, Division of Kennecotte Copper Corporation, of Birmingham, Alabama, Michael Supply Company, of Talladega, Alabama, Conner's, of Talladega, Alabama, Automotive Supply Company, of Sylacauga, Alabama, C. E. Nivens Truck & Tractor Company, of Sylacauga, Alabama, and Solar Cast, Inc. of Sylacauga, Alabama.

The United States and the Commission answered. Malone Freight Lines, Inc., Bowman Transportation Inc., Overnite Transportation Co., Roadway Express, Inc., Cotton States Motor Lines, Inc., dba

R. C. Motor Lines of Georgia, Dixie Highway Express, Inc., Baggett Transportation Co., Alabama Highway Express, United Motor Freight Terminal, Inc., Georgia Highway Express, Inc., B. C. Truck Lines, Inc., Akers Motor Lines, Inc., Parrish Dray Lines, Inc., Dixie-Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Eagle Motor Lines, Inc., G. F. A. Transportation Co., Inc., Terminal Transport Co., Johnson Freight Lines Company, Ryder Truck Lines, Dixie Highway Express Inc., McLean Trucking Co., Nilson Motor Express Inc., R. C. A. Truck Lines Inc., R. C. Motor Lines, Inc., and Youngblood Truck Lines Inc. intervened as parties defendant.

The judgment of the District Court was entered June 24, 1966. Notice of appeal was filed August 22, 1966. The Supreme Court has jurisdiction under 28 U.S.C. Sections 1253 and 2101(b) to review the judgment below on direct appeal. This jurisdiction is sustained by decisions in *Chicago & North Western Railway Company* v. *Chicago, Milwaukee, St. Paul & Pacific Railway Company,* 380 U.S. 448 (1965), and *Southern Railway Company* v. *North Carolina,* 376 U.S. 93 (1964).

STATUTES INVOLVED

Section 17(5-10) and Section 207(a) of the Interstate Commerce Act, 49 U.S.C. Section 17 (5-10) and 307(a), is printed as Appendix H.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(A) May the Interstate Commerce Commission reverse an examiner after the examiner's detailed finding of fact had been adopted by the Commission without specifying in detail the error of the examiner?

(B) May the Interstate Commerce Commission reverse an examiner on his finding of fact when the examiner viewed the witnesses and heard their testimony and the Interstate Commerce Commission did not?

(C) May the Interstate Commerce Commission, in the light of the mandate of the National Transportation Policy refuse to grant a petition for further hearing which was supported by affidavit showing abandonment of service by opposing carrier at the points applied for?

(D) May the Interstate Commerce Commission fail and refuse to consider evidence of record to the effect that the service proposed would not materially or adversely affect the existing motor carriers but would enable the plaintiff to serve the public more efficiently and economically?

STATEMENT OF THE CASE

F & B is a relatively small motor common carrier which has its home terminal in Sycamore, Alabama, adjacent to Sylacauga, Alabama, and in the immediate vicinity of Talladega and Childersburg, Alabama.

F & B is authorized, as pertinent here, to transport general commodities with certain exceptions which are not relevant here, *from* Chattanooga, Tennessee, Atlanta, Georgia, and points in South Carolina to Sycamore and Sylacauga; (2) textile products and textile machinery *from* Atlanta, Chattanooga and points in South Carolina to Childersburg and Talladega; (3) textile products *from* the four points to Atlanta, Chattanooga and points in South Carolina. It serves daily most of the textile facilities at the four points. It serves virtually all businesses in Sylacauga and Sycamore that secure shipments from or through the important gateway points of Atlanta, Chattanooga or Greenville, South Carolina.

Prior to the filing of this application, Transcon Lines, Ryder Truck Lines, Baggett Transportation Company, Inc. and Georgia Highway Express, Inc., provided direct LTL (less truckload) service between one or more of the four points of Sylacauga, Sycamore, Talladega and Childersburg, on the one hand, and, on the other, Atlanta, Chattanooga, and points in South Carolina. In 1962, Transcon Lines discontinued service within this area (TR. 1180-1181)* When Transcon Lines abandoned service to the four points in 1962, F & B filed an application for temporary authority to serve them. This temporary authority was denied. It also filed, on October 10, 1962, the application which is before this honorable court for review. The application was heard October 7-11 and 15-18, 1963, before a hearing examiner of the Interstate Commerce Commission. Thirty-six shippers, of which four were from Birmingham, one Sycamore, fifteen Sylacauga, eight Childersburg, and eight Talladega, together with three connecting motor common carriers, supported the application. Twenty-one motor common carriers actively opposed the application.

The hearing examiner, by report and recommended order served September 28, 1963, and after meticulously detailing the testimony of each of the supporting shippers and each of the opposing motor carriers, recommended that the applicant be authorized to operate (1) from Sycamore and Sylacauga to Chattanooga, Tennessee, Atlanta, Georgia and points in South Carolina; (2) between Sylacauga and Sycamore, on the one hand, and, on the other, Anniston, Alabama; (3) between Childersburg and Talladega, Alabama on the one hand, and on the other, Anniston, Alabama, Chattanooga, Tennessee, and Atlanta, Georgia, and points in South Carolina—all restricted against tacking with any existing authority to provide a through service (a) between Chattanooga, Tennessee and Atlanta, Georgia; (b) between Birmingham, Alabama and Atlanta, Georgia; (c) between Birmingham, Alabama, and Chattanooga, Tennessee (Appendix B, p. 20a).

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* Reference to the record will be indicated by the following abbreviations: TR-Transcript hearing before the Commission; EX.-Exhibits introduced at the hearing.

F & B excepted to the proposed tacking restriction. The protestants excepted to the recommended grant of authority.

The Commission, Division 1, denied the application by report an order dated March 11, 1965 (98 M.C.C. 304; Appendix C). On April 13, 1965, however, the Commission on its own motion reopened the proceeding for reconsideration on the existing record because of an obvious error on the part of the Commission (Appendix D).

On June 8, 1965, F & B filed a Petition for Further Hearing. F & B alleged in part that protestant Ryder Truck Lines had discontinued service between the involved points resulting in a critical loss of transportation service to these communities. The petition was supported by the affidavits of nine shippers. It is to be recalled that this application was filed after Transcon lines had previously abandoned service to these points.

On July 14, 1965, the Commission, Division 1, acting as an Appellate Division, entered an order denying petition for further hearing on the grounds that no sufficient cause had been shown notwithstanding the fact that probably the major protesting carrier, viz., Ryder Truck Lines, had discontinued service (Appendix E).

On the same date, the Commission, Division 1, acting as an Appellate Division, issued its report and order on reconsideration denying the application (99 M.C.C. 258; Appendix F). In essence, the Commission held that (1) the shippers failed to establish a need for the proposed service; (2) no material inadequacy was shown in the existing service; and (3) the proposed service would not meet the transportation needs of the existing shippers.

F & B petitioned the Commission for reconsideration. By order on November 12, 1965, the Commission, Division 1, Acting as an Appellate Division, denied the petition (Appendix G).

F & B filed the complaint in the court below on February 24, 1966 to set aside and enjoin the Commission's orders.

On June 24, 1966, a District Court entered an opinion and judgment dismissing the complaint and affirming the Commission's orders. The District Court found that the orders were supported by substantial evidence and that the function of the court on review was not to resolve relevant factual issues entrusted to the expertise of the Commission. (256 F. Supp. 23, Appendix A)

THE QUESTIONS ARE SUBSTANTIAL

The following questions are presented by this appeal:

May the Interstate Commerce Commission reverse an examiner after the examiner's detailed finding of fact had been adopted by the Commission without specifying in detail the error of the examiner?

May the Interstate Commerce Commission reverse an examiner on his finding of fact when the examiner viewed the witnesses and heard their testimony and the Interstate Commerce Commission did not?

May the Interstate Commerce Commission, in the light of the mandate of the National Transportation Policy refuse to grant a petition for further hearing which was supported by affidavit showing abandonment of service by opposing carrier at the points applied for?

May the Interstate Commerce Commission fail and refuse to consider evidence of record to the effect that the service proposed would not materially or adversely affect the existing motor carriers but would enable the plaintiff to serve the public more efficiently and economically?

These questions are important to carriers and to shippers. They have never been decided by this Court although this Court has established certain principles in connection with other administrative agencies which bear on the weight to be given an examiner's recommended report.

The decision in this case, as it now stands, nullifies the effect of the testimony of witnesses who have testified orally as to their needs for transportation service and, in addition, removes all reason from appellate procedure within the Interstate Commerce Commission. The record in this case reflects that F & B effectively has been denied the right of appeal by the procedure of review within the Commission, and, within that procedure, the findings of fact of the examiner have been arbitrarily disregarded, ignored or misconstrued without explanation.

The National Transportation Policy declares in part that the Interstate Commerce Act should be so administered as to

> "promote safe, adequate, economical, and efficient service and foster sound economic conditions of transportation and among the several carriers;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of commerce of the United States, of the coastal service, and of the National Defense." (Preface to Title 49, USC, Chapter 1)

Pursuant to the mandate of the National Transportation Policy, after Transcon Lines discontinued service an application was filed by F & B to serve four small towns in the State of Alabama under the provisions of Title 49, U.S.C. 307(a) (Appendix H, page 94a). The examiner took the oral testimony of the 36 shipper witnesses and the three connecting line carriers in support of this application. He observed the demeanor of those witnesses, minutely detailed their testimony in his report and recommended order and recommended the grant of authority. (Appendix B, page 6a)

The Commission, Division 1, Acting as an Appellate Division, found:

> "We find the examiner's statement of facts to be accurate in all material respects, and, except as modified here, we adopt as our own. Certain facts will be restated to the extent necessary for clarity of discussion". (Appendix F, p. 82a)

Thus the dominant portion of the above quotation with which we are concerned is "except as modified herein".

Division 1, Acting as an Appellate Division, then found without pointing out any deficiencies in the examiner's report:

> "In summary, we believe the record as a whole shows no material inadequacy in the existing single line and joint line motor services available both from opposing carriers who have been used and have provided reasonably adequate service as well as from those carriers whose services have not been tried" (99 M.C.C. 266, Appendix F, p. 91a).

This finding is flatly erroneous. The record shows without question that protestants failed to provide service between most of the points involved. The remaining points received inadequate service. For instance, no protestant provides direct LTL service between Sycamore, Sylacauga, Childersburg, and Talledega on the one hand, and, on the other, points in South Carolina (TR 338-339, 400, 427-437, 513, 476, 483, 569-572, 633-634, 690-691, 696, 727, 749, 754-755, and 996). Ten protestants have authority to serve South Carolina but either do not or cannot serve the four points on LTL traffic. Only Bowman Transportation Company offered evidence of interline service only. Ryder Truck Lines, during the hearing, served between Sylacauga and Childersburg, on the one hand, and, on the other points in South Carolina but Ryder abandoned service (Reply of Akers, et al. to applicant's petition for further hearing, p. 7, filed June 4, 1965). This fact was incorporated into the record (Order of Commission denying petition for further hearing entered July 14, 1965; Appendix E). However, Division 1 Acting as an Appellate Division, blindly ignored the abandonment by Ryder and repeatedly refers to the adequate service Ryder provides on LTL traffic (99 M.C.C. at 262-263, Appendix F, pp. 85a-87a).

No protestant provides LTL service from Sycamore, Alabama, to Atlanta, Georgia, or Chattanooga (TR. 351-352). No protestant provides direct LTL service between Talladega, Alabama, and Chattanooga, Tennessee (TR. 634, 638, 648, and 896). Baggett Transportation Company only provides service between Sylacauga, Alabama on the one hand, and, on the other, Atlanta, Georgia, and Chattanooga, Tennessee, but virtually all the Sylacauga shippers find Baggett Service grossly inefficient (TR. 184, 340-342, 381-382, 481-483, 655, 752, 1008-1010, 1032). These citations are but examples. Upon analysis it appears that Division 1, Acting as an Appellate Division, attempts to evade the evidence of lack of LTL's Service by stating the *conclusion* that many of the shippers are "primarily interested in the outbound transportation of volume rather than less than truckload shipments" (99 M.C.C. at 265, Appendix F, p. 90a). From this conclusion Division 1 moves easily to the next conclusion that shippers "have not tried or are unaware of the variety of services now available from the regular route as well as irregular route of protesting carriers" (99 M.C.C. at 265-266, Appendix F, p. 90a). However, only two of the thirty-two reporting shippers at the four points were "primarily interested" in truckload service.

The examiner, after hearing the testimony of these witnesses, found "many of the supporting shippers have shown that they require overnight service to and from the points sought in the application." (Appendix B, p. 18a) This finding was supported by specific documentation in the record (See Appendix A to the examiner's report Appendix B). Division 1, Acting as an Appellate Division, after reading the record, made the blanket finding that the shippers do not need overnight service on LTL traffic (99 M.C.C. at 265 Appendix F). No explanation for such reversal is given.

Although the evidence was not rebutted, Division 1, Acting as an Appellate Division, never refers to the actual experience of these shippers routing their shipments by F & B to Sycamore in order to obtain overnight service. Division 1 also ignores the testimony that overnight service is required by these shippers to operate their mills and factories, to sell their products, and to obtain service for their customers. It is arbitrary to the extreme to substitute judgment in the face of the only "evidence". If the reasons given by these shippers for overnight service have some infirmity, neither the parties nor the court can ever know in view of the silence of Division 1 on this point. We are left to speculate upon what the Commission did in a secret conference. The Commission has a legal duty to demonstrate reasons for its conclusions.

In *Saginaw Broadcasting Company* v. *Federal Communications Commission,* 96 F. 2d 554, 561 (BC CIR), cert. denied 305 U.S. 613 (1938), the Court noted:

> "These decisions showed that a reviewing court cannot properly exercise its functions upon findings of ultimate fact alone but must require also findings of basic facts which represent the determination of the administrative body as to the meaning of the evidence, and from which the ultimate facts flow."

The case of *Dixie Highway Express, Inc. et al.* v. *U. S. et al.,* 242 F. Supp. 1016 (DC-Miss.), is almost a mirror image of the instant case. In that case the joint board *denied* the application after making specific finding and reversed without reason. Also in the *Dixie* case two new carriers had been granted authority whose service had not been tried. In this case service had been abandoned by one of the dominant protestants to points involved.

In the *Dixie* case the court stated:

> "While it is recognized that there must necessarily be some limitations upon specifics in a finding of facts which influence or control Commission action, would appear irrefragable that in view of the Commission's adoption generally of the board's findings, that the Commission was obliged to state with more than ordinary specificity any contrary finding of facts available to it in this record to influence its decision. We are not favored with any such findings in this record."

It was also held that:

> "While this court has its statutory limitations upon the scope and range to review in cases of this kind (5 USCA Sec. 1009(e)), still the Inter-

> state Commerce Commission does not possess any carte blanche authority to disregard positive, undenied, credible testimony and binding judicial opinions and applicable legal presidence in these cases. . . ."
>
> "The commission has dealt with this record throughout its report in vague and nebulous terms. Without making any finding of facts from the record to support its conclusions, it has dealt with this problem in its entirety and genralities without favoring us with any facts to be found in this record to support the conclusion which they reached. Although the Commission expressly adopted the board's statements of fact as being correct in all material respects; and without making any specific findings by the commission which are supported by this record, the commission has nevertheless proceeded to disapprove the sound conclusions based upon such findings to the contrary."

The above is equally applicable to this case, however, the error is even more compounded by the fact that the examiner based his finding of fact not only upon what the witnesses testified but also upon his observation of the demeanor of that witness in giving that testimony. This court has recognized the importance of the findings of fact by the examiner after viewing the witnesses in the case of *Universal Camera Corporation* v. *N.L.R.B.,* 340 U.S. 474. At page 494 the court quoted from the legislative history of the Administrative Procedure Act as follows:

> "The conclusion is confirmed by the indications and legislative history that enhancement of the status and function of the trial examiner was one of the important purposes of the movement for administrative reform.

> "This aim was set forth by the Attorney General's Committee on administrative procedure:
>
> " 'In general the relationship upon appeal between the hearing commissioner and the agency sought to a considerable extent to be that of trial court to Appellate Court. Conclusions, interpretations, law, and policy should, of course, be opened to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.' "

The court went on to state that at page 496:

> "We do not require that the examiner's findings be given more weight than reason and in the light of judicial experience they deserve. The 'substantial evidence' standard is not modified in any way when the board and its examiner disagree."

The hearing examiner was obviously an important portion of the procedure provided for by the Interstate Commerce Act. The examiner was given all of the powers that any of the commissioners or boards were given under the act (Appendix H, p. 97a).

Division 1, Acting as an Appellate Division, denied a petition of F & B for further hearing in which (1) affidavits were given to the effect that Ryder had discontinued service, (2) a letter from Dixie Highway Express, Inc. withdrawing its opposition and stating that it felt the authority should be granted F & B and (3) the affidavit of the shippers to the effect that Alabama Highway Express had not instituted the service that they "proposed" at the time of the hearing.

There is no question but that the discontinuance of service by Ryder Truck Lines constituted a serious change in the motor carrier service within these small communities, especially when Division 1, Acting as an Appellate Division, repeatedly refers to the adequate service Ryder provides shippers on LTL traffic (99 M.C.C. at 262-263, Appendix F, pp. 85a-87a). Division 1 also refers to the service offered by Dixie Highway Express (99 M.C.C. at 262, Appendix F, p. 88a). In a letter to the secretary of the Commission dated March 23, 1965, Jack Cole withdrew the protest of Dixie Highway and stated: "we feel the shippers need F & B service".

Obviously service, which had been performed by carriers which has since been abandoned, should not be considered in a denial.

Nor should that abandonment of service be ignored on a petition for rehearing.

F & B explained all the above in detail in its petition for further hearing. The commission found, however, that the petition presented "no sufficient or proper cause—for reopening the proceeding" (Appendix E, p. 79a).

The Commission has broad discretion to grant or deny a petition for further hearing; however, the realm of this discretion is not absolute. This Honorable Court stated in the case of *Atchison T. and S. F. R. Co.* v. *United States*, 284 U.S. 258, at page 262:

> "In the instant proceeding, the hearing recorded related to conditions which had been radically changed, and a hearing, suitably requested, which would have permitted the presentation of evidence relating to existing conditions, was denied. We

> think that this action was not within the permitted range of the commission's discretion, but was a denial of right".

F & B is a small carrier but, as acknowledged by the protestants in this case, handled the majority of the traffic to and from these four small towns. The examiner found, and that finding was adopted by Division 1 of the Commission, that a grant of the application "would not cause undue harm to the existing service." (Appendix B, p. 18a) and further, that:

> "Under applicant's present operating authority, shippers who receive freight from applicant almost daily and at which points applicant's vehicles are available almost daily for outbound movements, nevertheless may not use applicant for outbound traffic. This situation is uneconomical and inconvenient to shippers, since they must arrange their traffic so that applicant can load some of it and then arrange for another motor carrier to load other commodities possibly moving in the same direction . . . the service here proposed by applicant will result in service devoted particularly to the four points dedicated to the handling of less truckload traffic by a carrier already in the field, and one able to meet the requirements of the local shippers." (App. B, pp. 17a-18a)

Division 1 obviously ignored the evidence in this aspect and the courts and the Commission have recognized that a superior transportation service, together with the finding of no material adverse effect upon protestants' existing operations, quite properly justify finding of public convenience and necessity. *Roadway Express, Inc. Extension—Birmingham,* 82 M.C.C. 689.

The interpretation and application of the National Transportation Policy and Section 207(a) as adopted by the Commission and sanctioned by the lower court in this case, are not consistent with the statutory objectives, nor have the procedures followed by the Commission and sanctioned by the court below in this case been consistent with the provisions of the Interstate Commerce Act.

For these reasons, the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration.

Respectfully submitted,

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October 1966

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION

CIVIL ACTION No. 66-112

FLOYD & BEASLEY TRANSFER CO., INC., *Plaintiff*

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*

Before GEWIN, Circuit Judge, and LYNNE and GROOMS, District Judges.

PER CURIAM.

Proceeding under 49 U.S.C.A. sections 17 and 305(g) and (h), 28 U.S.C.A. sections 1336, 1398, 2284, 2321-2325, and 5 U.S.C.A. section 1009, plaintiff[1] brought this action against the Interstate Commerce Commission (hereafter Commission) and the United States[2] to enjoin, annul and set aside the Commission's report and order, entered July 14, 1965, in Docket No. MC-18088 (Sub-29), Floyd & Beasley Transfer Co., Extension-Childersburg.[3] By its report and order, the Commission, Division 1, acting as an appellate division, denied plaintiff's application for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle of general commodities, with the usual exceptions, over irregular routes between four points in Alabama, on the one hand, and, on the other, Chattanooga, Tennessee, Anniston, Alabama, Atlanta, Georgia, and points in South Carolina. On reconsideration the denial was affirmed by the Commission, Division 1, acting as an appellate division, on November 12, 1965.

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[1] Parker Fertilizer Company, Sylacauga Auto Parts Company, Campbell Auto Parts Company, Marble City Broadcasting Company, Inc., Joe Dark, d/b/a Modern Cleaners and Dark's Dairy, Avandole Mills, Inc., Sylacauga Motor Car Company, Alabama Marble Company, Division of Georgia Marble Company, Coosa Motor Company, Talladega Hardware Company, Danville Yarn Mills, Cooley Motor Company, Talladega Machinery and Supply Company, Talladega Foundry and Machine Company, Sarvis Hardware Company, L. M. Payne, Jr., d/b/a Payne L. P. Gas Company and Payne Gulf Oil Products, Southern Alloy Corporation, Dixie Color Printing Company, Hill Radio & TV Company, Plantation Patterns, Inc., The Okonite Company, Division of Kennecotte Copper Corporation, Michael Supply Company, Connor's, Automotive Supply Company, C. E. Nivens Truck & Tractor Company and Solar Cast, Inc. are intervenor-plaintiffs.

[2] Alabama Highway Express, Inc., Baggett Transportation Company, Akers Motor Lines, Inc., Johnson Freight Lines Company, Inc., McLean Trucking Company, Overnite Transportation Company, Inc., Malone Freight Lines, Inc., Bowman Transportation, Inc., Dixie Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., and Georgia Highway Express, Inc. are intervenor-defendants.

Only those proceedings before the Commission of significance to the ensuing discussion need be reviewed. In his report and recommended order, served September 28, 1964, the examiner made detailed findings of fact and recommended that plaintiff's application be granted with a restriction against joinder of certain operating rights.[4]

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[3] 99 M.C.C. 258.

[4] His ultimate findings and conclusions are stated as follows:

The examiner finds that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes, of general commodities, except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment (1) from Sylacauga and Sycamore, Ala., to Chattanooga, Tenn., Atlanta, Ga., and points in South Carolina, (2) between Sylacauga and Sycamore, Ala., on the one hand, and, on the other Anniston, Ala., and (3) between Childersburg and Talladega, Ala., on the one hand, and, on the other Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina, all restricted against joinder or tacking by applicant with any existing authority for the purpose of providing through service (a) between Chattanooga, Tenn., and Atlanta, Ga., (b) between Bir-

The Commission adopted the examiner's statements of fact as its own, except as modified in its discussion and evaluation of the evidence of record.[5] In disagreement with the result reached by the examiner, the Commission dealt with evidence relating to the adequacy of existing services to meet the transportation needs of affected shippers as distinguished from their preferences[6] and ultimately concluded: "On reconsideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied."[7]

This court has repeatedly stated our appreciation of the limited scope of judicial review to which the parties are entitled.[8] We have also recognized the broad scope of the Commission's discretion in granting or denying

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mingham, Ala., and Atlanta, Ga., or (c) between Birmingham, Ala., and Chattanooga, Tenn.

The examiner further finds that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; and that an appropriate certificate should be issued.

[5] 99 M.C.C. 260.

[6] Compare *Dixie Highway Express, Inc.* v. *United States,* 242 F. Supp. 1016 (S.D. Miss. 1965).

[7] 99 M.C.C. 266. Immediately preceding such conclusion was its summary of such evidence as follows:

> "In summary, we believe the record as a whole shows no material inadequacy in the existing single-line and joint-line motor services available both from opposing carriers who have been used and have provided reasonably adequate service as well as from those carriers who [sic] services have not yet been tried. In our opinion applicant has failed to establish that its proposed service would be responsive to a public need and, accordingly, we conclude that the application should be denied."

[8] *Malone Freight Lines, Inc.* v. *United States,* 204 F.Supp. 745, 754 (N.D. Ala. 1962) and cases therein cited.

certificates of public convenience and necessity as provided by section 207(a) of the Interstate Commerce Act.[9] In *Floyd & Beasley Transfer Company* v. *United States*, 185 F. Supp. 390, 395 (N.D. Ala. 1960) we stated:

> "By a long line of cases it is authoritatively settled that the Congress has delegated to the Commission broad and exclusive discretion to determine public convenience and necessity and that it is not the function of this court on review to resolve relevant factual issues entrusted to the expertise of such administrative body." (Citations omitted.)

Heretofore we have expressed our understanding that "the Commission is not bound by the findings of its hearing officer, but is free to reach conclusions upon the evidence contrary to those of its examiners."[10]

After a painstaking review of the whole, voluminous record in obedience to the command of the Administrative Procedure Act,[11] we conclude that there was a rational basis for the order under attack. The conclusions of the

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[9] Section 207(a) of the Interstate Commerce Act [49 U.S.C.A. § 307(a)] provides in part as follows:

"Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to control the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: * * *."

[10] *Eagle Motor Lines, Inc.* v. *United States*, 236 F. Supp. 502, 504 (N.D. Ala. 1964).

[11] 5 U.S.C.A. § 1009(e), as construed in *Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474 (1951).

Commission resulting in its denial of plaintiff's application were based upon adequate findings supported by substantial evidence.

Since, by stipulation of counsel, this cause was submitted upon plaintiff's prayer for final relief, an order of dismissal will be entered herein.

This the 24th day of June, 1966.

WALTER P. GEWIN, *Circuit Judge*
SEYBOURN H. LYNNE, *District Judge*
H. H. GROOMS, *District Judge*

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, EASTERN DIVISION

CIVIL ACTION No. 66-112

FLOYD & BEASLEY TRANSFER CO., INC., *Plaintiff*

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, *Defendants*

In conformity with the opinion of the court contemporaneously entered herein:

It is ORDERED, ADJUDGED and DECREED by the court that this action be and the same is hereby dismissed and that the costs of court incurred herein be and the same are hereby taxed against the plaintiff, Floyd & Beasley Transfer Co., Inc.

Done, this the 24 day of June, 1966.

WALTER P. GEWIN, *Circuit Judge*
SEYBOURN H. LYNNE, *District Judge*
H. H. GROOMS, *District Judge*

APPENDIX B

No. MC-18088 (Sub-No. 29)

FLOYDE & BEASLEY TRANSFER COMPANY, INC., EXTENSION—CHILDERSBURG

Decided September 28, 1964.

Public convenience and necessity found to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of general commodities with the usual exceptions, from or between four points in Alabama, on the one hand, and, on the other, Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina with a restriction against joinder of certain operating rights. Issuance of a certificate approved upon compliance by applicant with certain conditions. Application in all other respects denied.

A. Alvis Layne and *John W. Cooper* for applicants.

Maurice F. Bishop, John P. Carlton, Monty Schumacher, R. J. Reynolds III, Joe C. Morris, J. B. Smiley, Bates Block, Lenox O. Boyles, Frank A. Graham, Jr., Harold S. Hernly and *Leroy M. Kennedy* for protestants.

Report and Order

Recommended by Allen W. Hagerty, Examiner

By application filed October 10, 1962, Floyd &. Beasley Transfer Company, Inc., of Sycamore, Ala., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce, as a common carrier by motor vehicle, over irregular routes of general commodities, (except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment), between Sylacauga, Talladega, Childersburg and Sycamore, Ala., hereinafter called the 4 points on the one hand, and, on the other, Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held October 7 through October 11 and October 15 through October, 18 1963 at Sylacauga, Ala. Numerous motor carriers[1] oppose the application.

Applicant is a motor common carrier presently authorized to conduct operations in Alabama, Tennessee, Georgia and South Carolina, principally in the transportation of textile products. It, however, holds general commodity authority from Atlanta, Birmingham, Ala., Chattanooga and points in South Carolina to Sycamore and Sylacauga, among other specific destinations; and between Anniston and Birmingham over Alabama Highway 202. Summarizing, as is here pertinent, applicant presently may move textile products from the 4 points to points in Tennessee, Georgia, Alabama, and South Carolina and in the return direction transport general commodities with the usual exceptions from Atlanta, Birmingham, Chattanooga and points in South Carolina to Sycamore and Sylacauga. The purpose of the instant application, is to enable economic and efficient use of its equipment outbound from the 4 points which presently moves empty, or substantially less than capacity, from such points and to provide the 4 communities with a service dedicated to the transportation of small shipments through major gateway terminals, a service which applicant claims does not now exist. Should the instant application be approved there would result some duplicate operating authority[2] which applicant does not seek. Applicant maintains terminals at Sycamore, Birmingham, Lanett, Ala., Atlanta, Chattanooga and at Greenville, S. C. and presently serves shippers at the 4 points. For example, during the month of September it originated 3,314,810 pounds of freight at Childersburg, 613,943 pounds at Sycamore, 1,997,698 pounds at Sylacauga, and 569,641 pounds at Talladega, all of which moved to or through its authorized points, and consisted almost wholly of textile and related products. It maintains interline connections with numerous carriers at various gateway points in whose behalf traffic is delivered to the 4 points. These interline carriers include some of the protesting carriers, and it interlines textile traffic originating at the 4 points with these carriers. Applicant's position is that it has difficulty with its interline agreements with connecting carriers, and its shippers, because of its present limited operating authorities. As an example, it may move general commodities to Sylacauga but when a shipper is required to return automobile parts, delivered by applicant at Sylacauga to Atlanta, applicant may not perform this transportation and the shipper cannot understand why. This is said to be the basis of the confusion existing with its interline carriers. Another example of its inability to render a complete service is with the textile industry. It may move textiles outbound, but if the same shipper has to ship a machine for repairs, applicant is not authorized to handle this machine. It has equipment at the 4 points daily with the capacity to load outbound traffic. At the time of the hearing, applicant was serving Avondale Mills at Sycamore and at Sylacauga, Bon Air, Danville Yarn Mills and BeauKnit Mills at Childersburg, and the Wehadkee Yarn Mills, Bachmanux Bridge, Bemis Bag Co., and Brecon Knitting Mills at Talladega, with equipment at these plants daily. The equipment is not used to capacity and daily there is unused space in the vehicles both inbound and outbound. Applicant's present mode of operation is to gather traffic at the 4 points which consists mostly of less truckload traffic, and consolidate this traffic at its Sycamore terminal for movement, to points in its authorized territory. On the return movement, it collects traffic at Atlanta and at points in South Carolina which it consolidates at Greenville and then moves in truckload quantities to Sycamore with ultimate delivery to the other authorized points. There has been an imbalance of traffic moving from the 4 points which is reflected in the record of dispatches covering the two week period set out in applicant's Exhibit No. 9. This exhibit shows that for the two week period beginning September 22, and ending October 5, 1963, applicant operated 113 units of equipment from Sycamore to points in South Carolina, and in the reverse direction 131 loads. Eighteen complete units had to move empty into the Greenville terminal to handle this traffic. From the four points to Atlanta during these same two weeks, applicant moved 74 units of equipment, but from Atlanta to the four points, it used 79 units of equipment, indicating that is was necessary to move 5 empty vehicles to Atlanta to handle this traffic. Applicant proposes to provide service between the four points and the destination points and territory here involved much in the same manner as present operations are being conducted. It holds out overnight service to all points served direct and will consolidate less-truckload traffic, meaning shipments averaging less than 5,000 pounds, at Sycamore and as is presently done at Greenville. Truckload traffic will move direct from point of origin to point of destination.

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[1] Malone Freight Lines, Inc., Bowman Transportation Inc., Overnite Transportation Co., Roadway Express, Inc., Cotton States Motor Lines, Inc., dba R. C. Motor Lines of Georgia, Dixie Highway Express, Inc., Baggett Transportation Co., Alabama Highway Express, United Motor Freight Terminal, Inc., Georgia Highway Express, Inc., B.C. Truck Lines, Inc., Akers Motor Lines, Inc., Parrish Dray Lines, Inc., Dixie-Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Terminal Transport Co., Johnson Freight Lines Company, Ryder Truck Lines, Dixie Highway Express Inc., McLean Trucking Co., Nilson Motor Express Inc., R. C. A. Truck Lines Inc., R. C. Motor Lines, Inc., and Youngblood Truck Lines Inc. hereinafter referred to in the report by short names such as Malone, Bowman, etc.

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[2] Textile products from the 4 points to Chattanooga, Atlanta, and points in South Carolina, empty containers from the 4 points to Atlanta, Chattanooga and points in South Carolina; general commodities from Atlanta, Chattanooga and points in South Carolina to Sycamore and Slyacauga; canned goods from Chattanooga to the 4 points.

As of October 4, 1963, applicant, among other, owned and operated 80 tractors, 139 trailers and 14 pickup trucks. As of June 30, 1963, it had assets totalling $1,548,027, which included current assets of $603,073, and tangible property valued at $826,445 after depreciation. Its current liabilities as of that date amounted to $276,320, equipment obligations due within one year, $160,207 and it had an earned surplus of $491,697. Applicant maintains a comprehensive safety program and at the time of the hearing, appeared not to be in violation of the Interstate Commerce Act or the Commission's rules and regulations thereunder. Applicant is fit, financially and otherwise to conduct the proposed motor carrier operations.

SUPPORTING SHIPPERS

In all, 36 shippers were represented by witnesses who appeared in support of the application. They included 4 shippers at Birmingham, 8 at Childersburg, 1 at Sycamore, 15 at Sylacauga, and 8 shippers at Talladega. The circumstances and transportation requirements of each shipper are set out in detail in Appendix A. Except for the shippers at Birmingham these requirements and circumstances are similar and need not be discussed separately. Applicant presently serves many of the supporting shippers at the 4 points outbound transporting textile products and inbound at Sycamore and Sylacauga under general commodity authority, providing a consistent overnight service between the 4 points and Atlanta and other authorized points. In some instances, in order to receive overnight service, shippers at Childersburg and Talladega have their inbound movements of general commodities routed by applicant to the Sycamore terminal where they pick up the traffic in their own vehicles. The textile products shippers who presently use applicant from the 4 points have numerous occasions where applicant's vehicles are at their plants and move from their plants, but to ship a commodity other than textile products outbound, they must seek out another motor carrier. Shippers in Sylacauga and Sycamore frequently have traffic moving back to the destination territory of the application and are unable to move this traffic back by applicant even though applicant's vehicles are at their plants unloading inbound traffic. These shippers have not received a consistent overnight service from the carriers who do serve the 4 points. Preponderantly their traffic consists of small lot, less-than-truckload shipments and some of the shippers have traffic moving only once or twice a week. Because applicant is not authorized to move general commodity traffic outbound these shippers have been required to rely upon existing motor carriers, most of which operate through the 4 points over routes between large terminal points or carriers that dispatch peddle vehicles from Birmingham. Many of the shippers have experienced delays in pickups at their plants; delay in service because of the necessity of interchanging traffic, and difficulty in arranging pickups, because the carrier does not maintain a terminal at one or more of the 4 points. Each of the shippers has found applicant's service highly satisfactory and professes a need for the service here proposed. The Birmingham shippers are concerned principally with the movement of set-up iron and steel furniture moving through Atlanta to points beyond, and to points in South Carolina. Their experience has been that existing service which involves a delivery of their traffic to a connecting carrier has been unsatisfactory because many of the connecting motor carriers maintain restrictions in their tariffs against the handling of set-up furniture, and their shipments frequently have been returned because of no service beyond the interchange point. Okonite Company at Birmingham ships electric wire and high voltage cable to points in South Carolina and has been receiving from 3 to 7 day service to such points which is not satisfactory to meet the requirements of small volume buyers who must have fast delivery. They require second or at the latest third morning delivery at points in South Carolina.

Supporting Motor Carriers

Three motor common carriers of general commodities support applicant because they feel the ability to interchange general commodity traffic with applicant will enhance their compatitive status with existing motor carriers. Harris Express holds authority to operate between points in New York, New Jersey, Pennsylvania, Maryland, Virginia, North and South Carolina and the District of Columbia. It maintains a terminal at Greenville, S. C., which is its interchange points for Alabama traffic. It has been interchanging with Ryder and with applicant for traffic moving to and from the 4 points. It has been able to use applicant as a connecting carrier on a limited basis because applicant may not transport general commodities to the 4 points from Greenville. It cannot effectively compete for traffic in the area here involved, particularly with long haul carriers operating between points in the northeast through gateways to the south, such as Atlanta and Birmingham.

Ross Nealy Express operates within Alabama. It interchanges traffic at Birmingham for Chattanooga, Atlanta and points in the east. Its Chattanooga traffic is interchanged with Central, and Central is in the process of purchasing East Alabama Express, one of its competitors, which when ultimately consummated, will enable Central to provide single-line service to Chattanooga. Applicant, under its proposed service, would provide a feasible connecting carrier service at Birmingham for Atlanta, Chattanooga and South Carolina traffic. Ross Nealy feels that it would handle a greater volume of traffic if its interchange arrangements were with a non-competitive carrier such as applicant.

Branch Motor Express Co., is in the process of acquiring control of Morgan Trucking Company which, when consummated, will result in operating rights extending from South Carolina, North Carolina, portions of Tennessee, to points in the eastern seaboard States and to parts of New England. Morgan has a terminal at Greenville, and at the time of the hearing had interchange arrangements with Ryder and applicant for the movement of traffic to and from points in Alabama. Its arrangement with Ryder providing for an interchange at Greenville was terminated in 1962, and since then it has interchanged traffic at Charlotte, N. C., short-hauling Morgan. Roadway, Akers and Overnite serve much of the territory served by Branch and in addition may serve Atlanta and points in Alabama direct. Branch is therefore seeking an interchange arrangement which will enable it to compete on a more equal basis with these competitors and wants to continue with applicant which, under the proposed service, would provide a more competitive arrangement for traffic moving to and from Alabama points.

PROTESTING MOTOR CARRIERS

Nineteen motor carriers appeared at the hearing in opposition to the application. The detail of their operating authorities and ability to perform the proposed service is discussed as to each carrier in Appendix B hereto. Of these 19 protestants 4, namely, Bowman, Malone, Parrish, and Georgia Highway-B. C. may serve the 4 points. Parrish's service is between the 4 points and Atlanta and South Carolina, and Georgia Highway-B. C.'s authority is between the 4 points and points in Georgia and Chattanooga. The other protesting motor carriers are concerned mostly with traffic from and to the 4 points which move to them as connecting carriers. Baggett may serve Sylacauga and Childersburg. Succintly stated, the situation of these carriers, as pertinent to this application, is as follows:

> Bowman may transport general commodities over regular routes between Birmingham and Chattanooga and may operate between the 4 points, on the one hand, and on the other, Chattanooga, Atlanta, and points in South Carolina. An exhibit showing movement of 17 shipments to points beyond Atlanta, or from Chattanooga to Sylacauga, or Talladega indicates that 4 were delivered direct to Sylacauga, 2 in over-night service and 2 second morning, or longer, delivery. The other shipments were transported by Bowman to Birmingham and then given to a connecting motor carrier for delivery to Sylacauga or Talladega. These shipments were ltl., but direct delivery was made when the shipments were in excess of 2,400 pounds.

Malone has only one terminal at Birmingham and has a very limited ltl operation. It is principally a truckload carrier, obviously not interested in the small type shipments which originates at the 4 points.

Up to the time of the hearing Alabama Highway admittedly did not hold out a substantial ltl service to and from the 4 points. Its Exhibit 29 bears this out since most of the traffic it did handle involved truckload shipments. Its authority includes the 4 points to and from portions of Georgia and all of Tennessee.

Baggett may not serve Talladega or Sycamore or points in South Carolina direct. All of its traffic clears through its Birmingham terminal. Baggett owns controlling interest in Alabama Highway.

Dixie-Ohio does not serve the 4 points direct, but only in interline service through the Birmingham gateway.

Anniston-Talladega is concerned only with traffic between Atlanta and Talladega since it does not serve any other of the 4 points.

Nilson's authority is very limited. It is authorized to serve, insofar as here concerned, between points in South Carolina and Atlanta with no service at the 4 points.

McLean's interest in the application concerns traffic moving between Atlanta and points in South Carolina and such traffic as it would receive at Atlanta from the 4 points, and from Birmingham, moving to points on its regular routes in eastern seaboard States.

Terminal's interest in the application is as a connecting carrier since it does not serve the 4 points and is concerned principally with traffic moving between Atlanta and Chattanooga.

Ryder serves Sylacauga, Talladega and Childersburg with a peddle run out of Birmingham. It has no terminal at Sylacauga, but is driver may be contacted at Avondale Mills at 1:00 o'clock P.M. for outbound traffic moving through Birmingham. Its Exhibit No. 51 shows that in August 1963, it handled 13 shipments direct into the Sylacauga area, with an average weight of 9,357 pounds each.

Akers is an interchange carrier and is interested in traffic to and from the 4 points which it would receive at Atlanta destined to points along the Atlantic seaboard as far north as New England, and into South Carolina.

Parrish may pick up and deliver in irregular route authority at the 4 points to points in South Carolina and to Atlanta. It has solicited traffic from the supporting shippers but seems mostly to have handled truckload shipments from and to the 4 points.

Cotton dba as RC of Georgia does not serve the 4 points and is concerned as an interchange carrier providing service between Atlanta and points in South Carolina.

Georgia, with its subsidiary, may serve the 4 points to Atlanta and Chattanooga and interchanges traffic at Atlanta for points in South Carolina. It has participated in ltl traffic movements to and from Talladega and has handled ltl shipments to Sylacauga and Childersburg.

Overnite is concerned with the movement of traffic between Atlanta and other Georgia points and points in South Carolina, North Carolina and Virginia, and the possibility of applicant handling traffic between points in the Chattanooga and Birmingham areas, on the one hand, and, on the other, points in South Carolina.

United operates between Birmingham and Atlanta and between Birmingham and Anniston and is concerned with the application to this extent.

Roadway's routes extend between Chattanooga, Birmingham, Atlanta and South Carolina points and is concerned with the possible competition between these points.

Dixie Highway serves Sylacauga and Talladega, with shipments restricted to 5,000 pounds or more, and operates between Birmingham and Atlanta through Anniston. It has served the supporting shippers at Birmingham.

Youngblood may operate between Atlanta and points in South Carolina and by operating through a common point may serve points in North Carolina. It also participates as an interchange carrier in interstate traffic from and to Alabama points.

ARGUMENTS ON BRIEF

While the discussion here concerning protestant's brief is very limited all of the contentions and arguments raised therein have had careful consideration.

Generally the protestants point to the tacking possibilities available to applicant enabling service between Birmingham and Atlanta, Chattanooga and all points in South Carolina between Atlanta and Chattanooga, Atlanta and points in South Carolina and between Chattanooga and Birmingham, and the lack of evidence establishing a need for such service. It is their position that service by them to and from Sylacauga has been satisfactory, particularly in view of the small amount of traffic moving to and from this point, and that this is likewise true concerning Talladega. They argue that the primary support to the application stems from "local pride and prejudice'' and by shippers that receive service from applicant on textile products and textile machinery. They contend that the existing carriers are giving substantially satisfactory service in the face of the fact that the 4 points are not on main traffic arteries.

DISCUSSION AND CONCLUSIONS

It is certain that shippers at the 4 points must rely almost wholly on motor carrier service to meet their transportation requirements. It has been established, as pointed out by protestants, that these communities are small communities generating a low volume of freight both inbound and outbound, and, as applicant contends, it is evident that the protesting motor carriers have not made a serious effort to meet the requirements of these shippers for this ltl freight. The evidence tends to show, and protestants indicate that for many of them, the principal concern about the proposed service is the tacking possibilities that would obtain. Under applicant's present operating authority, shippers who receive freight from applicant almost daily and at which plants applicant's vehicles are available almost daily for outbound movements, nevertheless may not use applicant for outbound traffic. This situation is uneconomical and inconvenient to shippers, since they must arrange their traffic so that applicant can load some of it and then arrange for another motor carrier to load other commodities possibly moving to the same destination. Many of the supporting shippers have shown that they require overnight service to and from the points sought in the application, and some of them have even gone so far, in attempting to obtain such service, as routing their traffic by applicant to Sycamore and then dispatching their own vehicles to Sycamore for pick-up. Applicant has performed a satisfactory service in the area of this application and is willing to devote its service to the needs of these low volume shippers. It has demonstrated an ability to provide overnight delivery to and from Atlanta and to and from some points in South Carolina. Protestants stress the point that inadequacy in their service has not been established but a lack of a showing inadequacy, standing alone, is not sufficient to bar a grant of authority. See *Nashua Motor Express Inc., United States of America* Fed. Sup. (decided May 5, 1964 U. S. Dist. Court for the Dist. of New Hampshire). For the sake of argument assuming no inadequacy in the present service, the evidence clearly establishes that the proposed service would provide a much improved service without undue harm to the existing service, particularly where, as has been shown on this record, the protesting carriers have not been prone to handle the low volume infrequent less-truckload shipments from and to the 4 points. See *Campus Travel Inc.,* v. *The United States,* 224, Fed. Sup. 146. The service here proposed by applicant will result in a service devoted particularly to the 4 points, dedicated to the handling of less-truckload traffic by a carrier already in the field, and one able to meet the requirements of the local shippers. It seems to the examiner that here the public would best be served by allowing such an improved and dedicated service, and the examiner concludes that the application should be granted to the extent set out in the findings herein. See *Brashwell Freight Lines, Inc., Extension—Atlanta* 95 M.C.C. 457.

As heretofore noted, the granting of the instant application will result in some duplicating operating authority, noted in footnote 2 hereto. The eliminations of all of this duplicating authority from that here recommended or from applicant's present certificates might cause complications. Rather it seems sufficient here to state that no duplicating operating authority is intended by the instant grant of authority and any existing duplications that result, such operating rights are inseverable both as to applicant's existing authority, or to the authority here recommended. No need has been shown for service between Birmingham and Atlanta, between Birmingham and Chattanooga, or between Chatanooga and Atlanta, service which could be accomplished by tacking should the application be granted as requested.

FINDINGS

The examiner finds that the present and future public convenience and necessity require operation by applicant in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes, of general commodities, except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment (1) from Sylacauga and Sycamore, Ala., to Chattanooga, Tenn., Atlanta, Ga., and points in South Carolina, (2) between Sylacauga and Sycamore, Ala., on the one hand, and, on the other Anniston, Ala., and (3) between Childersburg and Talladega, Ala., on the one hand, and, on the other Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina, all restricted against joinder or tacking by applicant with any existing authority for the purpose of providing through service (a) between Chattanooga, Tenn., and Atlanta, Ga., (b) between Birmingham, Ala., and Atlanta, Ga., or (c) between Birmingham, Ala., and Chattanooga, Tenn.

The examiner further finds that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; and that an appropriate certificate should be issued.

In view of the findings herein the examiner recommends that the appended order be entered.

By Allen W. Hagerty, Hearing Examiner.

(Signature) ALLEN W. HAGERTY

APPENDIX A

SUPPORTING SHIPPERS

Parker Fertilizer Company, of Sylacauga, with its affiliate Parker Gin Company, among other, manufactures and distributes plant food fertilizer under the trade name of "Sta-Green" used generally for home size lawns and gardens. This product is distributed through hardware stores, grocery stores and stores such as Sears-Roebuck that retail garden supplies. The distribution trend requires frequent small lot shipments which move in ltl service is required between Sylacauga and Atlanta and Chattanooga, a service which this shipper claims does not exist. Parker makes an effort to have this product shipped in attractive bags which should be delivered to the ultimate user in an untorn good condition. This shipper is receiving no better than second morning delivery at Atlanta with a handling at Birmingham which increases the chance of damage to the bag. Parker uses applicant for inbound shipments and has found the service satisfactory with overnight direct service from Atlanta and Chattanooga. This shipper feels that outbound direct service will increase its sales potentiality and professes a need for the proposed service. It ships about 600 tons of Sta-Green annually to Atlanta and Chattanooga, 25 percent of which moves in motor common carrier service.

Sylacacga Auto Parts Company, of Sylacauga is a wholesale dealer of auto parts doing business principally with service stations, garages, car dealers and plant operators. A good deal of its sales and traffic consist of rebuilt manufacturer's items such as fuel pumps, carburetors, distributors, engines and crank shafts, the rebuilding of which is done principally in Atlanta. It is therefore necessary that the part or machine to be rebuilt be moved to Atlanta and returned to Sylacauga as expeditiously as possible. There is also a movement of return items which are found to be defective or overstocked and these items must be returned within a time limitation in order that refunds can be had.

Campbell Auto Parts Company operates exactly in the same manner but is located at Childersburg.

Both of these wholesale dealers have used applicant for service of products moving into Sylacauga. Campbell picks up its products at Sylacauga. These shippers do not have available what they consider to be satisfactory service from any motor carrier other than applicant. No motor carrier has solicited their business. They believe that their business will be enhanced considerably if the proposed service is made available and they will use it.

WMLS, a radio station in Sylacauga occasionally ships transformers to be rewound and tape recorders to be repaired. The movement is to Atlanta and always is of an emergency nature. These movements are very infrequent but when a breakdown occurs the repair must be made as quickly as possible because with either of the two units of equipment out of service the radio station cannot function.

Mr. Joe Dark operates Modern Cleaners and Darks Dairy and supports the instant application. It was established however that the Modern Cleaners had no outbound traffic and that the dairy is located outside of the commercial zone of Sylacauga and therefore not in the territory of the application.

Avondale Mills operates three plants at Sylacauga, and one at Sycamore, engaged in producing textiles consisting of yarn and cotton piece goods finished and unfinished. Its outbound traffic from Sycamore is mostly cotton yarn and of its production approximately 150,000 pounds each week, 99 percent moves outbound in motor carriage. In addition to yarn Avondale occasionally is required to ship machinery out for repairs, paint and supplies of chemicals that are returned or replacement rollers moving back to manufacturers to be recovered. This moves mostly from its plant at Sycamore and in volumes of about 5,000 pounds a month. Avondale is using applicant for its outbound textile traffic but is handicapped because it can use applicant only for textile products and not for the movement of its other commodities. This back movement occurs almost daily and it must depend on other carriers when available for this service. Because applicant provides a 24-hour pickup and is located in Sycamore, Avondale has been able to eliminate about 50 percent of its warehouse help. It represents a need for the outbound movement of commodities other than textiles. The same situation exists at the Sylacauga plants. As to the Sylacauga plants these other articles consist of lumber, hardware, softeners, size chemicals, dyes, boxes, packages, paper and many items that go into the manufacture of cotton piece goods. It has circumstances where a winding machine is picked up by Akers Motor Lines, or McLean, or Johnson at Whitinsville, N. C., and moved into the plant by applicant. When the machine is unpacked and concealed damages found, Floyd & Beasley is unable to move the shipment back. Because of the lack of transportation facilities some of the companies with which Avondale does business send in their own trucks to pick up these items for the outbound movement. Avondale has applicant's equipment in its Mill Yards continuously during the working hours of the day. Applicant delivers all incoming traffic between 11:00 o'clock and 12 o'clock each day. With that same delivery applicant could pick up the outbound shipments with the same equipment that made the delivery, thereby relieving Avondale's shipping clerk for the rest of the day for other duties. Otherwise he is tied down at the shipping dock waiting on one carrier to come in for 20 pounds moving to a particular point and another carrier to come in for traffic moving to another point. Motor carrier service at Sylacauga is not always available for pickup when called and may be as late as 4:30 in the afternoon or the next day. Motor carriers operating out of Birmingham make one trip a day through Sylacauga according to Avondale's experience and if the outbound shipment is not ready by 10:00 o'clock in the morning then the traffic lays over until the next day. Inbound service on general commodities presently performed by applicant is characterized as excellent, and it asks all interchange carriers beyond applicant to disregard routings and give the traffic to applicant. Applicant has been providing overnight service from Atlanta, Chattanooga and Greenville, S. C., and in cases of emergency, same day service from Atlanta. This type of service is required for outbound movement, particularly, involving machinery that is moved for repair. Ryder, North Alabama and Baggett serve the Avondale plants at Sycamore and Sylacauga. The services of these carriers has been characterized as not satisfactory. Baggett has not made pickups on occasions until late in the afternoon of the day the service is requested and on some occasions, not until the next day, and on other occasions, a request for service has been disregarded. Ryder's truck is dispatched from Birmingham daily and it reaches the Avondale Mill yard once a day at an undetermined hour. Outbound movements of the commodities, other than textiles, move to points in New England, in North and South Carolina, and to Atlanta, and Chattanooga with the heaviest movement into the Carolina area.

Sylacauga Motor Car Company of Sylacauga, is a Chevrolet-Oldsmobile Dealership, shipping and receiving commodities from or through Atlanta, Chattanooga and points in South Carolina. Inbound it receives automobile parts and accessories and outboard motor parts, motors and accessories. Outbound it ships parts, accessories and outboard motors which move back for repairs. Automobile parts that move outbound from Sylacauga are those which are surplus, unsaleable or are exchange parts or parts ordered through error. An example of a return movement of parts would be a car shipped with certain equipment, but on arrival has the wrong equipment. The manufacturer then ships a replacement part and the wrong part must be returned, expeditiously, in order that the proper credit goes through. If the outbound shipment is delayed, loss of credit could occur. This shipper routes its inbound traffic when it may from Atlanta by applicant, and has been receiving overnight service. Baggett has been handling its outbound traffic, but it takes Baggett twice as long to move a shipment from Sylacauga to Atlanta than for applicant to move a shipment from Atlanta to Sylacauga. As far as the witness in behalf of this shipper knows, no motor carrier has solicited its outbound traffic. There are shipments several times a month which move only to either Atlanta or Birmingham.

Wehadkee Yarn Mills has its Talladega Division at Talladega where it operates two yarn mills and a dye plant. Its interest is to obtain better inbound service at the dye plant where it receives cold water dyes, water softeners, purifiers, and related materials for dye plant operations. Most of these supplies are shipped from the Atlanta and the Greenville areas. These inbound materials amount to about 250,000 pounds each quarter year, but move daily, the preponderance from Atlanta. The plant routes its inbound shipments and requires expedited delivery, particularly where dyes are involved, because many different colors are used and there are so many that a quantity of each may not be stocked. When an order is placed for yarn of a color not in stock, then expedited inbound movement is necessary. This shipper seeks overnight delivery from Atlanta in circumstances where the order for service could be placed prior to 3:00 or 3:30 p.m., with delivery the following morning. It desires second day delivery from Carolina points. At the time of the hearing, dye coming from Greenville moved in three-line service. The shipper's witness feels that the single line proposed service would give faster delivery. Applicant has been used for inbound shipments of textile machinery parts from Atlanta and from the Carolinas in overnight service, which is characterized as satisfactory. Also, cores, tubes and cones move inbound from Hartsville, S. C., and the transportation thereof has been by the dealer in private carriage. In order to get the dealer or manufacturer to provide this transportation, it is necessary to order in truckload quantities, which results in a higher inventory than is desired. The shipper would request that applicant be used for this traffic should the application be approved. This shipper wants applicant to handle its outbound traffic since applicant is bringing in textile parts and transports yarn outbound, and is able to provide single line service.

Kimberly-Clark Corporation of Coasa Pines, Ala., said to be within the Childersburg commercial zone, operates a mill where it manufactures newsprint paper, ground wood printing paper and wood pulp. It is concerned with the transportation of machines, machine parts and supplies used in the mill such as chemicals, cotton softeners, felts and electrical parts which originate at points throughout the United States and move into the Coosa Pines plant. During periods of heavy repair work on paper machines and electric motors this inbound traffic is rather voluminous. Normally its flow of traffic inbound amounts to about 40 or 50 shipments each month, from the east which move in ltl shipments. Speed of delivery is very important because frequently supplies are needed to keep operating and this is particularly so as to machine parts and replacement parts since it does not maintain a large inventory. Outbound traffic consists of returned parts of machinery and supplies. The paper products move princially by railroad in outbound shipments. Ryder, North Alabama and Baggett have been used for the majority of the incoming traffic. This service is classified as fair because of delays at transfer points. This shipper wants overnight service from Atlanta and Greensville to Coosa Pines. Applicant has been used for the movement of cotton piece goods in bales of from 1,500 to 2,500 pounds each and has been rendering this shipper overnight service.

Georgia Marble Company operates two divisions in Sylacauga. Its Alabama Marble Division fabricates structural stone for installation of interiors and exteriors of buildings. In the Alabama Calcium Products Division it crushes, grinds, screens and treats native stone for different purposes and it is used in the paint, the rubber, the plastic, the building, the feed and in the agricultural insecticides industries. Finished marble is transported almost exclusively by truck both in truckload and less-truckload shipments. It ships about 80,000 pounds each month in less truckload lots and about 350,000 pounds a month in truckload lots. Approximately 750 tons of the crushed ground, or pulverized marble move from the Alabama Calcium Division each month both in truckload and in less truckload shipments with about 80 percent moving in truckloads. Limestone is crushed and marketed by the Alabama Division. Less truckload shipments move to customers who do not have warehouse space or to those who request delivery to certain job sites in quantities to do a specific type of job, and to customers who use a relative small quantity of the product and do not wish to store as much as a truckload at a time. Finished marble moves to points throughout the United States and the crushed ground or pulverized marble moves from Sylacauga generally to the southeastern and southwestern States. This shipper has used Baggett, Tomlinson & Sons, North Alabama, and Ryder for shipments of finished and pulverized marble. The latter carrier, however, is not used a great deal for this product because of damage claims. Ryder's service has been slow in that there have been occasions where the product was not delivered at all, and other where the delivery time ran from two to three weeks or from 8 to 10 days. One shipment handled by Baggett destined to Atlanta was never delivered. The shipper also has had delayed service from Sylacauga to Columbia, S. C., on shipments transported both by Baggett and by Ryder. Service by Ryder from Sylacauga ~~to~~ Raleigh, N. C., has taken from three to four days for delivery. Applicant is specified for service on traffic moving into the plants at Sylacauga where it is possible to make specification because applicant's service has been the best available to it, providing overnight deliveries for shipments inbound moving from or through Greenville, S. C. The shipper wants this type of service for the movement of its outbound traffic. Baggett provides daily pickup service at its plant in Sylacauga, and the shipper has no complaint concerning pickups.

Sale & Service, Inc., of Childersburg is an automotive parts jobber and warehouse distributor, distributing various automotive items and hardware. It maintains inventories that include about 30,000 different items. Inbound shipments are received from Atlanta and from Greenville, Ohio in volumes of from 4,000 to 32,000 pounds each month, which number from 15 to 20 shipments each month. This traffic has been moving inbound by applicant, Baggett, Ryder and North Alabama. Experience on outbound movements by North Alabama has entailed delays of from 4 to 5 days in pick up time. The shipper is primarily concerned with inbound shipments and principally from Atlanta. It has need for expedited service particularly with the respect to motor assemblies for which the customer is awaiting service. Floyd & Beasley is used whenever possible because it has provided overnight service from Atlanta and because this dealer may have a shipment dispatched on a Saturday that it may pick up at Sycamore on Sunday morning where such a requirement is necessary. It has used Ryder only where the shipper has designated Ryder. Baggett's service has been characterized as good. This shipper however, prefers applicant even though it requires that it pick up incoming shipments at applicant's Sycamore terminal, 11 miles from Childersburg. When the distributor learned that Malone, Bowman and Alabama Highway offered service in the area it wrote to these three carriers inquiring as to the type of service available to it but at the time of the hearing had not received any answer to its inquiries.

Coosa Motor Company in Childersburg is a Ford dealership and insofar as the instant application is concerned ships outbound and receives inbound commodities to and from Atlanta. Auto parts move inbound and consist chiefly of accessories and all types of motor and transmission, body repair parts. These shipments range in weight from 300 to 600 pounds and move weekly with an aggregate of from 1,000 to 2,000 pounds being delivered each month. Outbound traffic averages about a shipment a month and consists of engine or transmission assemblies which move either to Atlanta or Dearborn, Mich. The dealer routes inbound shipments only where emergencies are concerned and then asks that the shipment move by applicant because overnight service is rendered and pick up is made at the applicant's terminal in Sycamore. Baggett delivers some of the incoming stock orders providing second morning delivery. Baggett has not been designated for emergency shipments because of delivery delays and because the dealer asked Baggett for service involving a delivery on Saturday morning and was informed that Baggett does not make deliveries on Saturday. Normally second day delivery is satisfactory, but the dealer needs overnight service for emergency shipments and for that reason supports the instant application. The dealer does not know of Ryder and has not requested any service for the incoming stock movements except where emergency overnight service is required. These emergencies occur once or twice a month.

Talladega Hardware of Talladega receives inbound traffic from Atlanta consisting of general hardware, sporting goods, appliances and building hardware. Shipments move in almost daily of from 4,000 to 5,000 pounds each week. This inbound traffic moves in motor common carriage and have been coming in by Talladega Motor Express. It has used Floyd & Beasley on several occasions out of necessity, but would prefer not to be required to drive the 10 miles to the Sycamore terminal of applicant from Childersburg, or about 14 miles from Talladega. Applicant's service has been used when overnight delivery is necessary. On other occasions where speed is necessary this shipper uses its own trucks to go to Atlanta and pick up the traffic. If applicant's proposed overnight service were available it would discontinue this practice. Anniston-Talladega Motor Express has been providing two-day service or second day delivery.

The witness for the Talladega Hardware also operates the Limbaugh Hardware in Childersburg and the situation with respect to this hardware store is similar to the Talladega store except that the weekly incoming volume is not quite so large.

Danville Yarn Mills, a subsidiary of Danville Knitting Mills, has a plant at Bon Air, Ala., which is two miles south of Childersburg where it manufactures carded carton yarns. Its outbound movement of yarn amounts to about 8½ million pounds annually which moves 98 percent in less-truckload shipments. In addition to yarns it ships outbound lead promoters and waste products. Electrical motors are moved outbound to Atlanta to be reworked and returned back to the plant. These commodities, other than yarn, move once or twice a week and are shipped mostly to Atlanta. Occasionally a motor is returned to Winston-Salem, N. C., for repairs and when motors are sent back inbound expedited service is necessary since these motors are essential to production. The inbound commodities consist of corrugated cotton cones, steel springs, electrical supplies and all types of mill maintenance repair parts. These products move from Gastonia, Charlotte, Greenville, Chattanooga, Atlanta, Birmingham, Easly, S. C., and Westfield, Conn. Cones move in truckload lots with one shipment of 8,000 pounds each month. Corrugated cartons come in weekly in volumes of a million pounds annually. The volume of the other type of inbound traffic ranges from 200,000 to 250,000 pounds annually. Time in transit is a factor with respect to these inbound movements in order to prevent the maintenance of large inventories. Applicant is used for the outbound movement of yarns. When products other than yarn move outbound it is necessary that this shipper take the product to applicant at Sycamore. This is true also of the inbound shipment of springs, which move principally from Chattanooga and Greenville and must be expedited. Other products move in by Ryder, Baggett and other carriers, but applicant's service is preferred because overnight service is provided from these origins. Service presently available to the mill has taken as many as seven days from Bessemer City, N. C., five days from Columbus, Ga., five days from Greenville, five days from Gastonia, five days from Hampton, Ga. The mill has consistently received overnight service from Chattanooga, and Greenville and other points served direct by Floyd & Beasley and wants this type of service for all of its traffic. Corrugated cartons move in sometimes in private carriage but this is unsatisfactory because the supplier has his truck arrive at the plant at 6:00 o'clock in the morning which must be unloaded at that time. Applicant would handle the traffic by bringing it to the plant and leaving the trailer to be unloaded at the Mill's convenience and then reload with yarn on the outbound movement.

Cooley Motor Company of Talladega, Ala., ships and receives automobile parts to and from Atlanta. The inbound traffic ranges between 500 and 1,500 pounds a month and moves in one or two times a week. These are emergency shipments where, for example, a person with a car needing repair is awaiting the inbound movement of the repair part and in those circumstances the order usually is placed by telephone. The dealer has used several motor carriers, including Georgia Highway, North Alabama, Anniston-Talladega, and Railway Express service for inbound shipments, but this service ranges in transit time from 2 to 7 days. Applicant has provided overnight service to Sycamore, but it is necessary to go to the Sycamore terminal to pick up the shipment. The outbound traffic is very small in volume and consists of defective parts. The dealer is seeking overnight service from Atlanta and support the application for this purpose. The emergency type of shipment requires expedited service and these may occur three or four times a week.

Talladega Machinery & Supply Company and *Talladega Foundry & Machine Company,* both of Talladega, are closely associated through stock ownership. The Machine

Company manufactures machinery and repair parts. The Supply Company serves as a sales agent for the Machine Company selling in addition to those articles manufactured by the Machine Company such commodities as files, axle blades, or any article sold by an industrial supply house. It purchases and sells for many other companies but in filling orders will ship direct from the point of manufacture, say in the Carolinas or Georgia, to customers in Alabama. Raw materials used in the manufacture of textile machinery are received at Talladega from Chattanooga, Atlanta and from points in South Carolina in volumes of from 20,000 to 30,000 pounds each month which move in numerous ltl shipments with traffic coming in nearly every day. Applicant has been transporting textile and textile machinery parts from the Talladega plant to various points in Alabama and serves the plant daily. This shipper believes that it could receive better service from and to points in the Carolinas and Atlanta if it could ship by applicant without any restriction as to commodity. It has been receiving overnight service from applicant from points as far north as Spartanburg, S. C. Outbound shipments of textile repair parts and supplies for various types of industry move from Talladega through Chattanooga, Atlanta and to points in South Carolina, which range from a minimum of 2,000 pounds in weight and move outbound daily to or through Atlanta, with three or four shipments a month moving to destinations in the Carolinas. About one shipment each week moves to Chattanooga. Applicant has been used for small shipments of textile repair parts to points in the Carolinas and to points in North Georgia. The proposed service would meet a definite need of these affiliated companies and they would use it. Of the 20,000 to 30,000 pounds shipped inbound each month to the Talladega plant about 10 percent comes from Atlanta and 90 percent from points in the Carolinas and consist principally of core compound.

Sarvis Hardware of Sylacauga presently uses applicant for service on inbound shipments. Occasionally it moves water heaters, defective or in need of repair, to Chattanooga and to Atlanta. It has used Baggett for some outbound movements but had had trouble in getting pickups by Baggett and on one occasion when it had to wait a week for a pick-up finally delivered the shipment to the Baggett terminal. North Alabama is used occasionally but phone communication with that carrier at Sylacauga is through a recording system and pickups requested may not be made until the next day. Speed of delivery is important because the traffic involved homeowners' appliances for repair and return as quickly as possible. Ryder has not been used because it is necessary to contact this carrier by long distance telephone. Ryder's inbound service has not been used because of a claim difficulty with this carrier and because when delivery is made it is necessary for the Hardware Company's employees to assist in unloading the Ryder vehicle. Applicant has provided overnight service on inbound shipments and has vehicles at the Hardware store three or four times a week. It would be convenient to use applicant for outbound movements because these shipments could be made at the time applicant makes delivery of the inbound movement.

L. M. Payne, Jr., a Gulf distributor at Talladega sells articles usually sold at a gasoline filling station and receives inbound from Atlanta such commodities as batteries, stoves and tires with a frequency of about one shipment each week. On most occasions speed in transit is necessary for these inbound shipments. As an example, on the morning of October 10 a customer of the station wanted a battery for a diesel engine which involved a sale of nearly $200 but the dealer could not make the sale because he could not get overnight delivery of the battery from Atlanta. It is in quest of service of this nature that he supports the instant application.

Beauknit Mills at Coosa Pines, produces synthetic fibre, a yarn used both in the car and the textile industries. The mill at the time of the hearing was on a 24-hour day, seven days a week production basis because its mode of processing requires around the clock operation. Outbound this plant ships rayon yarn and a by-product known as salt cake. The outbound traffic in yarn moves by applicant and in the private trucks of the mill. Salt cake has been shipped, among other, by Malone and Alabama Highway. Inbound Beauknit receives some 9,000 commodities which consist of raw materials that make fibre and all supplies necessary to operate the plant. These commodities move both by rail and in motor carriage. The plant has been in operation for 15 years and during this period it has used applicant for its outbound movements of yarn and for the inbound movements of textile machinery. It feels that it would be of benefit to have applicant handle its products other than textile machinery on inbound movements since applicant serves the plant regularly. Shipments, mostly in ltl lots, are received daily from Atlanta. Some of its products move from Hartsville, S. C. Baggett, North Alabama Express and Trans-Con have been used for inbound traffic. Dye stuffs and raw material ingredients are received from Chattanooga which have moved in by Baggett and North Alabama Express in less truckload shipments with a frequency of about two shipments each week. Some truckload volume shipments move in from South Carolina origins. Beauknit wants overnight service from Atlanta, Chattanooga and from South Carolina origins and is not presently receiving such service. Where emergency shipments are involved it has used applicant to Sycamore and then picks up the shipment in Sycamore because it cannot get traffic moved out on Thursday routed by Baggett or North Alabama since these carriers do not deliver on Saturday or Sunday.

The witness in behalf of Beauknit also is a part owner of the Quality Book Store in Childersburg and distributes state textbooks and school supplies. Some of these supplies come from Atlanta and others from Shelbyville, Tenn., and at the time of the hearing were moving in motor carriage by North Alabama, Ryder and Baggett. The business is seasonal and it is difficult to anticipate customer needs which result offtimes in emergency purchases and shipments. The store has been receiving about three shipments a week from Atlanta during the peak months of August, September and October all in less truckload shipments. The shipments from Shelbyville, Tenn., move during the peak months approximately two times a month in small ltl quantities. Overnight transportation service from Atlanta has not been available to the store.

Going back to Beauknit, it proposes to build a staple fibre plant at its present location which will have a producing capacity of about 20 million pounds of yarn annually. When this plant gets into operation the need for fast motor carrier service both inbound and outbound will increase. Applicant's vehicles are in Childersburg and at the Coosa plant four times a week. Beauknit operates its own fleet of 16 trucks for the outbound movement of its product and operates these trucks between its plant, points in the Carolinas and in the New England States on a daily basis. If the protesting carriers would provide overnight service from Chattanooga, Atlanta and South Carolina points it would satisfy the needs of Beauknit and of the book store. Baggett has transported some outbound traffic for the mills and provides pickup and delivery service at the Coosa plant five days a week. The shipper characterizes this service as generally satisfactory.

Southern Alloy Corporation of Sylacauga manufactures replacement parts for the chemical and paper abrasives products industry. Actually it is a steel foundry. Its products move outbound in volume of about 4,000 pounds daily and it receives inbound traffic which moves by applicant. It ships to three regular customers in the

Chattanooga area, one consistent customer in Atlanta and three or four customers in South Carolina. It also has customers in West Virginia and ships four or five shipments a week to its regular customers. The shipments move in less truckload lots and consist principally of castings which weigh from 5 pounds to 800 pounds. Applicant has provided overnight service from Atlanta and comes into the plant about one time a week delivering commodities. This shipper wants applicant's service for outbound traffic because applicant under its proposed service would serve Chattanooga, Atlanta and points in South Carolina direct without interchange of traffic. Ryder and North Alabama have been used for outbound traffic. Their pickup service is characterized as satisfactory but not wholly satisfactory in line haul because of delays in making delivery and occasions involving lost shipments.

Dixie Color Printing Company of Sylacauga prints newspaper comic supplements and advertising circulars, devoting this plant solely to newspaper comic supplements. Dixie is a wholly owned subsidiary of Greater Buffalo Press, which has printing stations at Dunkirk, N. Y., Wilkes-Barre, Pa., one in Texas and this one in Sylacauga. At the time of the hearing it was printing for about 85 newspapers in the southeast and serving about 20 southern newspapers from Sylacauga. Eventually all of the newspaper printing will be done at the Sylacauga plant. Its outbound shipping amounts to approximately 200 to 250 tons each week which it moves mostly in truckload lots. Distribution usually is made in truckloads dispatched for several customers but when it is impossible to serve certain customers in connection with truckload shipments, resort must be had to motor common carriage. The supplements are dated for a particular Sunday printing begins about 15 days in advance of the Sunday date with the windup printing about 8 days in advance thereof. Dixie supports the instant application for less truckload traffic because the shipper believes that applicant would provide a satisfactory service. It has attempted to get service from Baggett involving shipments of 1,000 pounds each week moving to an Ohio destination. The carrier, however, would not guarantee a delivery time. The supplements must be delivered several days prior to the Sunday date so that they will be available for insertion. It would perfer to ship these less truckload shipments direct from its plant at Sylacauga and when it begins plant capacity operation it wants ltl service to Augusta, Ga., Beckley, Bluefield, Charleston and Clarksburg, W. Va., Danville, Ky., Durham, N. C., and to Florence, Anderson, Charleston, Columbia, Greenville, Orangeburg and other points in South Carolina. The plant has used applicant for inbound traffic and the service has been satisfactory.

Ribe & Company is a firm of traffic consultants that provide traffic information and advice to its shippers for the purpose of making available transportation to them best suited for their needs and support the instant application in behalf of Birmingham Ornamental Iron Company and Shook & Fletcher Supply Company, both located in Birmingham. Shook & Fletcher ship air conditioning equipment, materials and supplies and insulating materials, supplies and equipment. Birmingham Ornamental Iron Company ships wrought iron and steel furniture. This firm, acting in the capacity of a traffic manager for these shippers, is interested principally in traffic moving to Atlanta, Chattanooga, to Carolina points, to points in the Middle Atlantic area extending from the District of Columbia through Baltimore, Philadelphia, New York and to Boston, Mass. The furniture is the casual type of furniture consisting of chairs, tables, lounges and made of maunfactured steel bars, wrought and shaped and assembles by an electric welding process and is a finished article of furniture. The furniture is shipped in set-up condition in paperboard boxes. Traffic moves direct to retail outlets. Except for the large accounts such as Macy's in New York City, the product moves to be sold immediately on arrival at destination, and sometimes has already been sold when the order is placed. The shipper alleges a tendency on the part of motor carriers operating out of Birmingham to the middle Atlantic area to reject furniture shipments because of its bulk and low weight. The witness contacted a number of motor carriers to discuss the transportation needs particularly of Birmingham fundamental. Those contacted were Jack Cole, Roadway, Ryder, Central, Fayettesville Transfer Company, Associated, Super Motor Service, Bowman, Dixie-Ohio, Dixie-Highway, Baggett, Georgia Highway, D. C. Truck, and Akers. These carriers would not, according to the witness, "commit themselves to provide the transportation services we needed". This investigation, however, took place in 1959.

Rather than cope with these circumstances, the shipper resorted to the consolidation of small ltl shipments into carload shipments which moved by rail to Jersey City and then distributed locally by cartage and drayage concerns. In the spring of 1962 a service was made available in which applicant would pick up as an agent of the originating carrier and would handle trailerloads of furniture to load on piggyback type railroad cars to be moved by railroad to a point near Washington, D. C., and then transferred to delivery motor carriers. Some of the motor carriers operating out of Birmingham have published restrictions in their tariffs.[1]

The witness from the firm had a record of 28 shipments in 1963 extending through August and September. There were instances involving Jack Cole, Georgia Highway, Central Roadway, Ryder, Bowman, where shipments of furniture tendered these carriers ultimately were returned back to the shipper marked and unable to handle furniture.

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[1] Tariff No. 504-A, MF-I.C.C. 1058, which in substance do not apply joint rates on furniture or furniture parts, new or used, except when shipped flat or folded flat.

As to Shook & Fletcher Supply Company, its shipping room manager indicated a need for the proposed service because adequate transportation facilities were not available to his company. However, there was not testimony offered as to the basis for any inadequacies in existing service. Furniture shipments by Birmingham Ornamental Iron into the middle Atlantic area amount to in excess of 500,000 pounds each year and during the summer months, the peak season it ships from three to five trailerloads each week to the middle Atlantic area. Baggett was aware of the difficulty in moving the furniture and attempted to cooperate but had the problem, like other carriers out of Birmingham, of an interchange carrier that would handle the steel furniture. Baggett had no restrictions against transportation of this commodity and could provide service direct to Chattanooga and to Atlanta. The evidence also discloses some shipments tendered to Floyd & Beasley which were returned because of no service to the destination. As of October 11, 1963, Ryder's tariff restriction on this type of furniture has been lifted.

Sylacauga Tank Corporation, fabricates swimming pool filter tanks, ranging in size from 24 inches in diameter and 36 inches high to 108 inches in diameter and 48 inches high, cement bin and scaffolding. Its filters are marketed to seven or eight customers located in Atlanta, Birmingham, Alexander City, Nashville, and Albany, Ga. Shipping times and manner depend entirely upon the customer who may order a truckload of the filter tanks but occasionally require that four of five tanks be delivered rush. Where less truckload shipments are involved for-hire motor carriage is used. During the summer months these emergency shipments move about once a week and during the winter months probably one or two each month. It ships this type of shipment both to Atlanta and to Nashville and has made shipments to Norfolk and Virginia Beach, Va. On inbound traffic this fabricator specifies applicant for service from Atlanta and from any point where applicant is available because it prefers applicant's service. It has used other motor carriers such as Baggett and North Alabama but has had delays in this service on shipments moving into Virginia and to Atlantic. In one instance, the delay to Virginia Beach amounted to about three weeks. It has had some delay with service to Atlanta by North Alabama where the customer in Atlanta requested overnight service. Unless this shipper knows that the service actually will be rendered its delivery is made in private carriage. For this reason it supports the proposed service. The shipper has not used Ryder's service because it is not informed as to how it could contact Ryder but would use this carrier should it give overnight service to points such as Atlanta.

Hill Radio & T. V. Company of Sylacauga is engaged in sales and servicing of television and radio receivers, air conditioners, and refrigeration equipment. In connection with certain technical work performed by this dealer for an engineering firm in Atlanta TV chassis are shipped from Atlanta. There is some outbound movement which consist principally returning defective TV tubes back to the manufacturer at Indianapolis, Ind., or Atlanta. A rebuilt picture tube is purchased from a company in Georgia which moves inbound usually in private carriage of the vendor. An outbound movement is connected with the purchase of these tubes because the Sylacauga dealer receives an allowance for the old tubes returned for refurnishing. Usually from two to four tubes are shipped back to Atlanta at a time and this volume runs about 8 to 10 tubes each month making shipments about once a week. About half of these tubes, however, move to Birmingham where they are picked up by the manufacturer but there is a movement of about five tubes each month shipped in for-hire transportation to Atlanta. This dealer has used Baggett and North Alabama to Atlanta. A call for a pickup on a Friday usually results in the actual pickup on Monday or Tuesday of the following week and on two occasions North Alabama failed to make the pickup. Air conditioning parts and equipment move to Yorktown, Pa., and to Atlanta. This dealer supports the instant application because it would relieve him of the responsibility of hauling his own traffic and enable him to keep his store clear of storage merchandise. Also he does not carry cargo insurance and should there be a loss in his own vehicle he would have to stand it. These he hopes to avoid with the proposed service. He has not, however, contacted Ryder for service.

Fleming Harper engages as industrial traffic managers and consultants, and support the instant application in behalf of *Plantation Patterns,* one of its clients at Birmingham. Plantation Patterns manufactures steel porch and patio furniture equipped with glass fixtures. The tables are shipped set-up in paper cartons. During the first seven months of 1963 this manufacturer shipped approximately 254 carloads of freight aggregating slightly over 2 million pounds and numerous less truckload shipments. Some of the traffic moves to or through Chattanooga, Atlanta and points in South Carolina, for delivery to points in New York, Pennsylvania, New Jersey, Delaware, the New England States and in the Carolinas. Shipments are made to stores, warehouses and to direct retail outlets. At the time of the hearing this shipper had discontinued rail service because allegedly the eastern carriers would not handle less than carload freight. The less truckload shipments move in for-hire motor carriage and the shipper has used Roadway, Jack Cole, Dixie Highway, and Baggett. Plantation's experience with these carriers on shipments moving beyond direct lines has been similar to that of the previous Birmingham furniture shipper, in that many of the connecting motor carriers do not maintain rates on steel furniture shipments set-up and many of the shipments were returned because of no service beyond.

Okonite Company ships electric wire and high voltage cable from Birmingham to points in South Carolina. The commodities are used in construction factories and by power companies. Shipments are made to distributors, warehouses, construction companies and to public utilities such as South Carolina Electric and Gas and there are movements to plant sites. In 1953 it shipped 150,000 pounds of these products to Carolina destinations. The shipper wants second, or at latest, third morning delivery at points in South Carolina and had no such service available at the time of the hearing. Ryder and Bowman have provided from three to seven days service which is not satisfactory to meet the requirements of low volume customers who require fast delivery.

Southern Bell Telephone Company operates exchanges at Sylacauga, Childersburg, Alexander City, Dadesville, Goodwater, Talladega, and Munford, Ala. Test sets are shipped to Atlanta for modification as is other equipment such as key equipment and teletypes. These shipments move about once a week and range from 25 pounds to 400 pounds each. At present the telephone company moves this equipment in its own trucks to Anniston and then in for-hire carriage from Anniston to Atlanta. Speed in transit is necessary with these units, because when sent back for modification or repair they must be returned as expeditiously as possible. With the proposed service, the telephone company would be able to ship direct to Atlanta bypassing Anniston. The company has not used any common carrier service from Sylacauga and its supporting shipper was not aware that any such service is available.

Michael Supply Company of Talladega is in the plumbing, heating electrical, air conditioning and appliance business. It receives washers and dryers, and pipe fittings from Atlanta and lawn mowers from McDonough. If the proposed service were available it could buy 20 washers splitting with a Sylacauga affiliate. It could store and handle 10 units in the Talladega stores and would purchase in these quantities. It receives about 5 or 6,000 pounds of traffic a month including lead lump. These shipments move in about two times a week and are being handled mostly by Georgia Highway. This service has not been satisfactory because it takes about four days to get a lawn mower delivered at Talladega from McDonough. Occassionally it receives overnite service from Georgia Highway but other times third or fourth day delivery, on traffic moving from Atlanta. It has also used Anniston-Talladega Motors, which gives second or third day delivery from Atlanta. Speed of delivery is important to this dealer because he cannot afford to stock many refrigerators, and when he sells one it must be ordered and delivered quickly. This dealer supports the instant application because he feels that he can get overnight service from applicant from Atlanta.

Conner's at Talladega is engaged in selling applicances, furniture and music. It purchases its stock at Chattanooga from 15 manufacturers at points in the Carolinas and Atlanta and mtaintains a $90,000 inventory. Shipments move inbound in quantities of about 10 shipments each day. It is also a special order store selling from catalogues which involves deliveries from the Carolinas, from Atlanta and from Chattanooga. It also employs two interior decorators who operate in any city or locality decorating homes and this work involves the shipping of furniture direct to them as for example to Chattanooga, Anniston, Atlanta and other cities. The inbound traffic moves in motor common carriage. It would be helpful to this dealer if it could receive fast transportation on inbound traffic particularly with respect to the special order commodities which require expedited delivery and the shipper believes that applicant's proposed service would accomplish this. As to existing service, a shipment moving through the Chattanooga gateway remained at a Chattanooga terminal eight days. This dealer located it at the terminal and the company that had ordered it, a bank at Talladega, had to defer the opening of the bank because of this delay. It also has had some unsatisfactory claim experience rising out of a shipment of furniture which arrived in Birmingham in a damaged state. The dealer went to Birmingham, picked up the furniture, brought it back to his plant, repaired it, but as of the hearing date had not yet had any response to the claim. It seeks here to improve its tarnsportation service into Talladega and supports the instant application for this purpose.

Automotive Service Supply Co., of Sylacauga deals in wholesale parts and ships old cores, presumably radiator cores, brake shoes, generators, batteries and other repair parts to Atlanta in quantities of about 500 pounds each week. This traffic has been moving by Baggett and North Alabama. The dealer supports the instant application because he wants direct service to Atlanta so that the traffic can move as quickly as possible. Present service requires as long as 3 or 4 days from Sylacauga to Atlanta which is not satisfactory. Credit for these parts is not received until the parts arrive and it is important to this dealer that this credit be received as fast as possible.

C. E. Nivens Truck & Tractor Co., of Sylacauga returns or ships warranted parts removed from any vehicles to the dealer branches where purchased and these move to or through Chattanooga, Atlanta and Chamblee, Ga. These parts that have become broken down while under warranty must be returned to the dealer as quickly as possible in order to get credit. This dealer receives from 2 to 4 shipments a week by applicant providing overnight service. He would like the convenience of being able to load his outbound traffic while applicant's vehicles are unloading the inbound traffic and for this reason supports the instant application. It presently uses Baggett and North Alabama for outbound shipments but the service is sometimes a day or two late in pickup and in delivery and as a consequence, credits are not returned as quickly as needed.

This shipper wants applicant's direct overnight service out of Sylacauga for his outbound traffic.

Rudisell Foundry Co., and *Solar Cast Inc.,* support the application. Rudisell operates a plant in Anniston and in Sylacauga. It manufactured approximately $54,000,000 worth of shells for 155 mm. Howitzer and shell cases for other types of army equipment. At the time of the hearing this plant was substantially deactivated, but occasionally does have inbound and outbound shipments of machinery. Solar, Cast Inc., manufactures all types of artificial stones. The inbound and outbound shipments of machinery involve both plants and consists of machinery and machinery parts and related equipment. During the period from October 16, 1963 it shipped about 500 tons of LCL shipments for the two companies. The Solar company is concerned principally with small shipments that have to move expeditiously, such, for example, as an order for interior work or from 75 to 100 feet of floor tile which has to be on the job in Chattanooga at 8 o'clock the following morning. Solar has numerous shipments of this type which weigh in the neighborhood of 500 pounds each and these shipments must be delivered on time. These small lot shipments involve sales relating to bathroom work, kitchen counters, buffet counters, exterior surfaces for store fronts. Applicant has been handling much of the inbound traffic of these plants and has provided overnight service from Atlanta which has met the shipping requirements. It is this type of service that these shippers want from Sylacauga. The shipper has used existing service such as Baggett, North Alabama and Ryder. Baggett's pickup service has been described as satisfactory but what the shipper terms the "follow through" service has not been satisfactory. North Alabama's pickup service has not been good. The shipper wants to be able to control a shipment all the way through and feels that with applicant in single line service, it may do so.

APPENDIX B

Protesting Motor Carriers

Bowman is a motor common carrier of general commodities with the usual exceptions, authorized to operate over a network of regular routes and also over irregular routes, among other, between Cedartown, Lyndale, Mt. Berry, Rome and Summerville, Ga., on the one hand, and on the other, points in Alabama, and between points in South Carolina and Georgia. It also may transport general commodities with the usual exceptions over a regular route between Birmingham and Chattanooga and in connection therewith, may serve points within 10 miles of Chattanooga as off-route points. By joinder of these operating authorities, Bowman may operate between the points sought in the instant application. During the period of September 22 through September 28, 1963, Bowman handled 186 shipments from Birmingham to Atlanta, Chattanooga and points in South Carolina which aggregated 461,632 pounds in weight and consisted largely of less-than-truckload traffic. During this same week, it handled 92 shipments from Atlanta to Chattanooga which aggregated 157,562 pounds and represented mostly less-truckload shipments. In the reverse direction, this traffic consisted of 34 shipments with a total weight of 34,112. Bowman's witness had record of some 17 shipments of mostly LTL traffic which moved either from points beyond Atlanta or Atlanta or Chattanooga to Talladega and Sylacauga. Four of these shipments moved direct to destination and the other were brought to Birmingham by Bowman and then given to an interchange carrier for delivery either at Talladega or at Sylacauga. One shipment was delivered direct in overnight service, the other took two or more days for delivery and those that were transferred to a connecting carrier at Birmingham were delivered to the connecting carrier the morning after pickup. The weight of the shipments delivered direct were 9,324 pounds, 2,412.

pounds, 10,080 pounds and 10,500 pounds respectively. Bowman's witness has solicited Avondale Mills, Beauknit Mills, for traffic. Bowman has handled traffic for Birmingham Ornamental Iron generally throughout its territory and has had occasion where it was unable to find a connecting carrier that would handle the furniture shipped by this shipper to points beyond Bowman's own lines. Bowman does not maintain any restrictions in its tariff against the handling of wrought iron furniture assembled. Bowman is willing to enter into an interchange arrangement with Harris Express at Greenville, S. C., and would enter into an interchange agreement with Morgan Trucking Co., or its successor-in-interest, Branch Motor Express.

Malone, among other, has authority to transport general commodities with the usual exceptions over irregular routes between Montgomery, Ala., and points in Alabama within 65 miles of Birmingham including Birmingham, on the one hand, and on the other, points in Georgia, north of U. S. Highway 80 and Tennessee on and east of U. S. Highway 27 and in South Carolina. This authority when tacked with other, enables Malone to provide a general commodity service from the points here involved to points in many of the Atlantic Seaboard States, such as Delaware, Georgia, Maryland, New Jersey, Ohio, Pennsylvania, South Carolina, Virginia, West Virginia and the District of Columbia. Malone for a number of years, has contacted Avondale Mills soliciting its traffic and has transported occasional shipments for the Mills. This is true likewise of the Wehadkee Yarn Mills. It has handled both inbound and outbound shipments in behalf of Kimberly-Clark Co., and has contacted and handled traffic in behalf of the Georgia Marble Co. Malone does not maintain any tariff restrictions on the transportation of wrough iron or steel furniture. It is authorized to transport this commodity from Birmingham to points in Delaware, Pennsylvania, Maryland, Virginia and New York, but it has not been offered traffic by Birmingham Ornamental Iron Works or has it been offered traffic by Plantation Patterns Inc. Malone does not maintain any terminal facilities except at Birmingham and conducts a very limited less-than-truckload operation. Its Exhibit No. 25 is an example of this. This exhibit shows shipments transported by Malone in June, July and August 1963 from or to Sylacauga, Talladega, Childersburg and Sycamore. There were 30 such shipments which aggregated 702,764 pounds in weight and represented the transportation of yarn, sodium sulphide, newsprint paper, paper tablets, pipes and fittings in truckload shipments which range from 20,547 pounds as the lowest weight to 73,621 pounds the maximum weight. In order to handle a 200 pound shipment of marble from Sylacauga to Atlanta, it ordinarily would wait to pickup such a shipment when an over-the-road unit was in the Sylacauga area. It would attempt to dispatch a truck from Birmingham for such a shipment and would take it and attempt to consolidate it with other freight moving in the general territory of Atlanta, Ga. It is evident, however, that the pickup of a 200 pound shipment of this type at Sylacauga would depend on the availability of other freight which could be consolidated into a particular shipment. Malone does not spot equipment or assign it to a particular shipper and it does not have solicitors or salesmen soliciting traffic. According to its advertising data, Malone operation follows a strictly call-on-demand service responding to calls of truckload lots with indefinite periodic of service with non-scheduled departures and arrivals according to the convenience of the carrier.

Alabama Highway, insofar as is here pertinent, is authorized to operate over irregular routes between points in Alabama within 65 miles of Birmingham, including Birmingham, on the one hand, and on the other, points in Georgia on and west of U. S. Highway 129 and points in Tennessee. From the 4 points it may provide direct service to Louisville, Ky., points in Indiana and in a portion of Illinois and Ohio. It presently originates traffic at the 4 points in Alabama and operates between Birmingham and Atlanta and between Birmingham and Chattanooga, and between Anniston and Chattanooga. As to the instant application this protestant's terminal is at Birmingham and it solicits the four towns by salesmen from Birmingham and one who was headquartered at Anniston. Overnight service is provided between Anniston and Birmingham and Atlanta operating about 10 schedules weekly between Atlanta and Birmingham. The Birmingham-Chattanooga operation is principally truckload traffic. Alabama holds out overnight service, from the four points to points in Tennessee and Georgia and second morning service to points north of the Ohio River. This protestant's witness testified that as of October 16, 1963, it did not offer any "so-called highly ltl service" out of this area. As of that date, however, it was arranging within 60 or 90 days to occupy a joint terminal facility with Baggett at Baggett's Sylacauga terminal, at which time equipment would be domiciled at Sylacauga and the arrangements made with Baggett to perform pickup and delivery service for ltl traffic. During the period from January 4, 1963 through May 23, 1963, Alabama handled 1,452,123 pounds of freight which moved out of Coosa Pines, Sylacauga or Talladega to destinations in Tennessee, New York, Cedartown, Ga., Detroit, Mich., Aurora, Ill., and Portland, Maine. This traffic, however, was predominantly truckload traffic ranging in weight from 22,000 pounds to 43,000 pounds. Two shipments weighed 1,567 pounds and 7,028 pounds. During the same period 28 inbound shipments moved from points in Wisconsin, Indiana, Iowa, Minnesota, Illinois, Texas and from Memphis, Tenn., to Sylacauga or Talladega. This inbound tonnage aggregated 130,772 pounds in weight and consisted of shipments ranging from as low as 65 pounds to 38,000 pounds but mostly involved ltl shipments. Alabama has handled traffic from Alabama Marble Company, for Coosa River Newsprint Company, Newbury Manufacturing Company and fears that if the instant application is granted this traffic would be vulnerable.

Baggett is authorized, among other, to transport general commodities between Birmingham and Atlanta and between Birmingham and Sylacauga serving all intermediate points and the off-route point of the Government Powder Plant near Childersburg. It does not have authority to serve Sycamore or Talladega nor points in South Carolina. Insofar as is here pertinent it operates terminals at Sylacauga and at Birmingham, the Sylacauga terminal being in operation since April 1962. It also operates terminals at Atlanta and Chattanooga. About 45 percent of its overall traffic tonnagewise is interlined traffic and it maintains interline agreements with as many as 261 carriers which provide for interchange of traffic and of trailers at Birmingham, Atlanta, Anniston, Chattanooga among numerous points. Between Birmingham and Anniston it operates from 5 to 7 schedules each night, between Birmingham and Chattanooga from 8 to 15 schedules a night. Baggett stations 7 trailers, 3 tractors and 2 small pickup trucks at Sylacauga and provides daily pickup service. All less-truckload traffic moves to Birmingham and is handled across the Birmingham terminal regardless of ultimate destinations. Truckload traffic moving from Sylacauga would move direct to destinations or to the interchange points. It has about one or two trailerloads a day which would include both ltl and truckload traffic arriving at the Sylacauga terminal which arrives during the night and which is broken down and delivered the following day. The Sylacauga terminal is open daily from 7:00 o'clock to 5:00 o'clock p.m. This terminal has not been operating at a profit and if it were not for the inbound traffic it could not be maintained. The terminal also serves Alexandria City and in connection with protestant's intrastate traffic. During the period from June 3 to August 1963, Baggett handled about 372 less truckload shipments which originated at Sylacauga and moved to points principally in the southeastern States but also to points such as Cleveland, Ohio, Milwaukee, Wis., Long Island, N. Y., Chicago, Ill., Port Huron, Mich., Scottsbluff, Nebr. During the same period protestant handled approximately 234 ltl shipments which moved to Childersburg. For the first 6 months (presumably 1963) it moved 35,815,402 pounds of traffic from Birmingham to Atlanta and 42,277,206 pounds in the reverse direction. The tonnage between Birmingham and Chattanooga for this same period was 15,482,955 pounds and from Chattanooga to Birmingham 32,821,195 pounds, from Birmingham to Anniston it moved 8,707,450 pounds and in the reverse direction 7,666,593 pounds. From Birmingham to Sylacauga including Childersburg, it moved 4,332,897 pounds and from Sylacauga to Birmingham 2,511,529 pounds. Of the specific shipments shown in protestant's No. 35 approximately 180 shipments involved two days transit time, 40 shipments three days transit time and 24 shipments four or more days transit time about 130 shipments moving in one day. This represents traffic originating at Sylacauga and Childersburg. Baggett's principal concern about the granting of the applications is that it has operated its facilities in the Sylacauga area for some time and has been attempting to make this a profitable operation but thus far unsuccessfully. It feels that any further inroads on its traffic from this area would be quite detrimental to its ability to operate therein efficiently and economically.

Dixie-Ohio is a motor common carrier of general commodities operating over a network of regular routes which extend northward from Birmingham through Alabama, Tennessee, Kentucky, Ohio, and as far northward as Buffalo, N. Y., with a route extending between Birmingham and Chattanooga and between Atlanta and Chattanooga. Terminals insofar as here pertinent are maintained at Atlanta, Birmingham and Chattanooga. This protestant does not serve the four points direct but has an interchange agreement with Anniston-Talladega at Birmingham for service to and from Talladega. It also interchanges traffic with North Alabama and applicant at Birmingham to and from the four points. It handles substantial traffic between Chattanooga and Atlanta which during September 1963 amounted to 57 shipments with an aggregate weight of 160,937 pounds. In the return direction this traffic amounted to 24 shipments with a total weight of 39,604 pounds. During this same month it handled 24 shipments with an aggregate weight of 39,604 pounds from Chatanooga to Birmingham and in the reverse direction 77 shipments with a total weight of 443,692 pounds. From Atlanta, Ga., to Chattanooga during this same month it handled 262 shipments which aggregated 265,464 pounds in weight. During the first three months of 1963 Dixie-Ohio participated in 12 shipments which moved either from Sylacauga, Sycamore, Pell City, Alexander City, or Lafayette to Chattanooga. It does not maintain any restrictions in its tariff on wrought iron or steel furniture. In fact this protestant handled 20 shipments of steel furniture for Birmingham Ornamental Iron during the period from March 7, 1963 through October 8, 1963, none of which were returned to the shipper undelivered.

Anniston-Talladega holds Alabama operating authority which is registered with the Commission and over which it handles shipments moving in interstate or foreign commerce. Insofar as is here pertinent it has authority to operate between Birmingham and Talladega and between Anniston and Talladega. This protestant actively solicits traffic in Talladega and has handled numerous shipments moving between Atlanta and Talladega which are interchanged at Anniston and which show generally one and two day delivery. It has served numerous of the shippers in Talladega that supported the instant application. Traffic moving between Talladega and Chattanooga would move through the Birmingham gateway.

Nilson Motor Express is a motor common carrier authorized to transport both general and specific commodities between points in South Carolina such as Charleston, Georgetown and points in Georgia and the specific commodities of veneer plywood and finished lumber from Charleston to points in Tennessee. Traffic moving between Birmingham and Atlanta is interchanged at Atlanta with Baggett and to and from Sylacauga is interchanged at Atlanta with applicant and with Dixie Highway and Baggett. Traffic moving between its South Carolina points and Chattanooga, is interchanged with Aero Transport and Storage Company at Ft. Oglethorp. Insofar as here pertinent Nilson operates terminals at Charleston and Georgetown, S. C., and at Atlanta. This protestant does not maintain any tariff restrictions covering the movement of metal furniture and would provide a through service from Atlanta to its South Carolina territory, on this commodity by interchanging with carriers such as Dixie Highway and Baggett on the movement from Birmingham to Atlanta. It feels that while applicant is not a serious contender for ltl traffic that should the instant application be approved it would increase competition on traffic moving between Alabama and South Carolina points.

McLean operating Hayes is a motor common carrier of general commodities with routes extending insofar as here pertinent from Atlanta, Augusta and Savannah, Ga., and Charleston, S. C., northward through North Carolina, Virginia, West Virginia, Maryland, Pennsylvania and New York to Albany, N. Y., and as far north as Boston, Mass., with routes extending also from Richmond, Va., through Charleston, W. Va., to Louisville, Ky., and through Cincinnati and Indianapolis to Chicago. The Hayes routes extend throughout Ohio, Indiana, Kentucky, Tennessee, Illinois and to St. Louis, Mo. Hayes maintains a terminal at Atlanta and maintains concurrences at Atlanta with connecting motor carriers. For example, it has agreements with Baggett and Dixie Highway and United Motor Freight, Bowman, Georgia Highway and B.C. It connects with Baggett at Atlanta for service to and from Sylacauga, Georgia Highway-B. C. for service between Atlanta and

Talladega and with carriers serving Anniston and Birmingham for traffic moving between Birmingham and Atlanta and points beyond. McLean opposes the instant application insofar as it contemplates service between Atlanta and points in South Carolina and interline arrangements with Morgan-Branch and with Harris which would permit movements through the Atlantic Seaboard States in competition with it and would make its traffic vulnerable to applicant and these carriers. McLean does not publish restrictions in its tariffs that preclude the handling of iron and steel furniture, in interline service from Birmingham to points on its McLean's routes. McLean opposes only that portion of the application which involves the possibility of operating to and from South Carolina points.

Terminal and Johnson are motor common carriers of general commodities and Johnson at the time of the hearing was being operated under the control of Terminal with approval of the Commission. Terminal operates regular routes which extend from Clearwater and Jacksonville, Fla., through Atlanta and Nashville northward to Louisville, Indianapolis and Chicago and with a route extending from Birmingham to Chicago. Johnson's regular routes extend northward from Atlanta to Dothan, Ga., Chattanooga and Nashville, Tenn., Louisville, Ky., into Cincinnati, Ohio. Insofar as is here pertinent these protestants operate terminals at Birmingham, Atlanta and Chattanooga. Terminal is concerned with the tacking possibilities of the instant application which would enable service by applicant between Atlanta and Chattanooga and between Birmingham and Chattanooga. It interlines traffic with applicants at Birmingham, Atlanta and at Chattanooga and would like to continue doing business with applicant which it characterizes as a good interline carrier. It does not publish any restrictions against the handling of setup wrought iron or steel furniture but had encountered difficulty interchanging such traffic beyond its own lines. Its traffic during August of 1963 between Atlanta and Chattanooga approximated 850,000 pounds in each direction. It does not handle traffic between Birmingham and Chattanooga or between Birmingham and Atlanta.

Ryder is a motor common carrier and with it affiliates operates over a network of regular routes which, westward extend to El Paso, northward to Chicago and to Roanoke, Va., along the eastern Seaboard. As pertinent hereto one of its regular routes identified by Ryder as Highway 278 is between Columbus, Ga., and Birmingham, Ala., over which it serves, the intermediate points of Sylacauga, Childersburg and Sycamore. It operates a Sylacauga peddle run originating at its Birmingham terminal daily five days a week Monday through Friday. This truck departs from Birmingham between 5 and 6:00 o'clock in the morning arriving at Childersburg on its first stop at 7:00 a.m. This run then works the outlying communities such as Coosa Pines and then proceeds to Sylacauga making deliveries at Sylacauga and if it has freight on it for Goodwater, Ala., it goes on to that point and returns to Sylacauga where it lays over until usually 1:00 o'clock p.m. at the Avondale Mills and then proceeds to Childersburg returning to Birmingham at 5:00 or 6:00 o'clock p.m. Ryder does not maintain a terminal at Sylacauga but has arrangements whereby its drivers may be contacted at Avondale Mills at 1:00 o'clock each day for the handling of outbound traffic. The time in transit of shipments from Atlanta to Talladega or Sycamore preponderantly required two days. Some, however, were one day and there were shipments that took as high as five days or four days or three days usually when a weekend intervened. On the Sylacauga Loop run during August 14 and 15, 1963, the peddle truck handled 17 shipments which aggregated 11,028 pounds and produced $152.00 in revenue which moved to points such as Gnatts Quarry and Sylacauga or to Coosa Pines, Childersburg or Sylacauga. Other exhibits introduced by Ryder show that during the month of August, Ryder handled 65 shipments of general commodities which aggregated 32,666 pounds and 69 shipments of textiles which averaged 47,111 pounds, on the Sylacauga peddle run which are classified as outbound shipments and 277 inbound shipments aggregating 205,846 pounds. There were an average of 13 inbound shipments which averaged 9,357 pounds in weight as against an average of 6 outbound shipments aggregating 3,626 pounds which included textiles. During the three days of September 18, 19 and 20, 1963, Ryder handled 145 shipments from Birmingham to Atlanta, Chattanooga and to Greenville. In connection with the Birmingham movement to points north and east of Birmingham for the period from August 4, through August 31, 1963, Ryder dispatched 68 deadhead vehicles from Birmingham moving to points north and east for loading which compared with one vehicle moving inbound deadhead to Birmingham. During the first 4 months of 1962, Ryder delivered 23,230 pounds of freight to applicant at Birmingham in interchange movement and in return during this same period received 108,665 pounds of freight from applicant at Birmingham or at Atlanta in interchange service. During August 1963, Ryder transported 13,258 shipments aggregating 19,974,600 pounds which produced $271,600 in revenue in operations which it terms "to, from and through" points in the authority sought by applicant. This, it feels, would be vulnerable to diversion should the application be approved. Ryder does not maintain restrictions in its tariffs limiting, in any way, the handling of setup wrought iron furniture from Birmingham. In an effort to obviate situations where applicant would pick up traffic, for example, at Avondale Mills and carry it to Birmingham for interchange with Ryder, Ryder cancelled its interchange agreement with applicant and now handles the traffic direct.

Akers is a motor common carrier providing service over a network of regular routes, and with some irregular route authority, which geographically includes Georgia, South Carolina, North Carolina, Maryland, New York, and the New England territory. Insofar as the instant application is concerned, its interest is in traffic moving primarily to and from points in South Carolina such as from Atlanta to all points in South Carolina. Atlanta is this protestant's normal gateway for receiving or tendering traffic to and from points involved in the instant application. It interchanges at Atlanta with applicant, with Baggett, Dixie and Ryder among others. Akers does not publish restrictions affecting the transportation of wrought iron furniture and will participate in this type of traffic. It feels that should the instant application be approved Floyd & Beasley could originate traffic and move it to Atlanta but also could bypass Atlanta, giving Akers a short haul, or giving the traffic the two of its competitors, namely Harris and Branch who supported the application. It fears that applicant would interchange traffic with it at Greenville, S. C., instead of Atlanta.

Parrish is a motor common carrier authorized, among other, to transport general commodities between points in Sumter County, S. C., on the one hand, and, on the other, Atlanta and points in South Carolina and between Sumter, S. C., on the one hand, and, on the other, points in Alabama. By joinder of these operating rights at Sumter, Parrish may serve the four Alabama points on traffic moving to and from Atlanta and points in South Carolina. Service at the four points would be performed with trailers stationed at Birmingham. During August 1963, this protestant transported 25 truckload shipments from Leeds or Birmingham, Ala., to points in South Carolina and 16 truckload shipments from Birmingham and Leeds to points in North Carolina. Because of an alleged imbalance in traffic it is deadheading equipment from Alabama to points in South Carolina. It has solicited traffic at Talladega and at Sylacauga and actually has had shipments moving into Childersburg, Sylacauga and Talladega. Alabama traffic moving to South Carolina destinations amounts to about one-third of this protestant's total revenue. It feels that this traffic would be put in jeopardy should the instant application be approved.

Cotton States, doing business as R. C. Motor Lines of Georgia, operates over a system of regular and irregular routes as a common carrier of general commodities with the usual exceptions. Routes extend northward from Jacksonville through Georgia, the Carolinas, Virginia, Maryland, Pennsylvania and New Jersey into New York City with a regular route authority in Georgia, South and North Carolina. The interest of this protestant is traffic moving between Atlanta and points in the Carolinas and to points in the Eastern Seaboard States. It is concerned with applicant's ability, by tacking, to serve between Birmingham and points in South Carolina and between Atlanta and points in South Carolina. It does not serve the four points direct. It presently interchanges with applicant at Atlanta and Greenville, S. C., and interchange arrangements with other carriers such as Baggett, Georgia Highway, Hoover, Roadway and Ryder.

Georgia Highway Express is a motor common carrier of general commodities and is the parent company controlling B. C. Truck Lines, Inc. Georgia's regular route authority extends from Valdosta, Thomasville and Cedar Springs, Ga., on the south to Atlanta and into Chattanooga and northward to Knoxville, Tenn. B. C.'s authority is irregular route in nature between LaGrange, Ga., on the one hand, and, all points in Alabama, and between LaGrange and all points in Georgia. Thus by joinder at LaGrange, Georgia and its subsidiary may serve the four points and insofar as is here pertinent Atlanta and Chattanooga. Among other pertinent terminals are maintained at Birmingham, LaGrange, Atlanta and Chattanooga. Georgia's opposition to the application is based on applicant's becoming more competitive for traffic moving between the four points and Atlanta, and between Birmingham and Atlanta. During the period from June 15 through

August 31, 1963, Georgia and its subsidiary handled about 417 shipments which moved from points in Georgia, South Carolina, North Carolina, Missouri, Connecticut, New York, Massachusetts, Rhode Island, Illinois, Maryland, Mississippi, Ohio, Chattanooga, Tenn., Princeton, N. J., and Pennsylvania to Talladega. Georgia's Exhibit No. 90 shows that it had shipments originating at Pittsburgh, Pa., Collinsville, Conn., Lancaster, Pa., and Baltimore, Md., which moved to the Talladega Hardware, Inc. On the preponderance of these shipments overnight service was given from the interchange point to Talladega. Service is rendered between Anniston, Ala., by a pickup truck which operates between Anniston and Talladega each day Monday through Friday. Deliveries are made in the mornings and pickup in the afternoons with the return of the vehicle to Anniston from 4:30 to 6:00 p.m. Protestant's exhibits show shipments moving to the Talladega Machinery Supply Company, the Michael Supply, Inc., Wehadkee Yarn Mill, Conners, the Payne Store and Cooley Motors all in Talladega. During the period from June 5, 1963, through September 5, 1963, this protestant transported 389 shipments that originated at Talladega which moved to points on its own lines or to its gateways to points beyond and handled 78 shipments which moved from various points to either Sylacauga or Childersburg. Three of these shipments originated at Sycamore, Ala., and moved to LaGrange. At the time of the hearing this protestant did not maintain any restrictions on metal furniture and actually was participating in some of this traffic from Birmingham. Georgia opposes all phases of the application but specifically the proposed service that would enable operation between Atlanta and the Alabama points and between Atlanta and Birmingham and Atlanta and Chattanooga.

Overnight is a motor common carrier operating generally in parts of Georgia and parts of North Carolina, South Carolina and Virginia. It maintains a terminal, among other, at Atlanta and is interested in the instant application insofar as it involves authority to all points in South Carolina and to points in North Carolina and Virginia. Generally it provides overnight service to points from 375 to 400 miles of the origin point of the traffic. It maintains interchange arrangements with connecting motor carriers at principal gateway points and does have such an agreement with applicant for interchange both at Greenville and at Atlanta. Its opposition to the application stems from the possibility of applicant moving traffic from South Carolina into the Birmingham area and the Chattanooga area and in the opposite direction and also between Atlanta and South Carolina points and between Chattanooga and Atlanta. Its interest in Chattanooga stems from a contract to buy Rutherford Freight Lines.

United Motor Freight Terminal, Inc., is a motor common carrier of general commodities with authority to operate between Birmingham and Atlanta and Atlanta and Anniston, Ala. It has terminals at Atlanta, Anniston and Birmingham. During January 1963 this protestant handled 3,320 shipments from Birmingham to Atlanta which aggregated 3,738,612 pounds in weight; from Anniston to Atlanta it handled 388 shipments aggregating 1,057,387 pounds and during this same month handled 647 shipments aggregating 5,076,140 pounds in weight from Atlanta to Birmingham and 639 shipments totalling 718,360 pounds from Atlanta to Anniston. On an average it operates about one empty vehicle a day from Birmingham back to Atlanta and because of the imbalance of traffic between these two points. It interchanges traffic at Atlanta for points beyond numerous carriers and handles traffic originating at South Carolina points moving to Birmingham through its interchange arrangements. This protestant fears the proposed operation by applicant as an additional competitor for traffic moving between Birmingham and Atlanta.

Roadway operates a network of regular routes which extend from Amarillo, San Antonio and Houston, Tex., on the west extensively throughout the eastern States, with routes among other through the southeastern States. Among other it operates terminals at Birmingham Chattanooga, Greenville and Atlanta. It does not serve the four points direct but maintains interline agreements with connecting carriers at Birmingham, with applicant, with North Alabama, Anniston-Talladega, and Hall moving traffic to and from the four points as frequently as it is available. It provides seven days a week service. Its lines extend from Birmingham to Atlanta, Birmingham and Chattanooga and between Birmingham and South Carolina points and to this extent it fears applicant's competition.

Dixie Highway Express is a motor common carrier of general commodities operating over a system of regular routes insofar as is here concerned with a route between Birmingham and Tuskegee, Ala., authorizing service to and from the off-route points of Sylacauga and Talladega restricted, among other, to shipments of 5,000 pounds or more. This route extends through Atlanta authorizing service between Birmingham and Atlanta, and at the intermediate point of Anniston. From June 1, 1963, through October 11, 1963, it handled 35 shipments from Talladega which aggregated 498,849 pounds in weight. This was in behalf of the Bemis Brothers Bag Company. In August of 1963 it handled two shipments for the Newbury Manufacturing Company at Talladega. From January 16, 1963 to September 27, 1963, it handled 21 shipments aggregating 562,817 pounds from Sylacauga in behalf of Thompson and Wieman and Alabama Marble Company. This protestant maintains interchange arrangements with numerous motor carriers at Atlanta and moves traffic through the Atlanta gateway to and from points in the Carolinas, among other. It has and is handling traffic for the two shippers of wrought iron furniture at Birmingham. It fears the proposed application as establishing more competition for traffic moving over its own lines and through its interchange gateways. It is particularly concerned with the interchange traffic since approximately 75 percent of its tonnage between Anniston, Birmingham and Atlanta represents interline traffic.

As here pertinent, *Youngblood* operates between Atlanta and points in North and South Carolina with regular routes extending through Kentucky, Virginia, West Virginia and Ohio. Among other it operates a terminal at Atlanta. By interchange it participates in traffic moving from points in Alabama through Atlanta to and from points in South Carolina and fears applicant's competition between Birmingham, Atlanta and South Carolina points, other points in Alabama from and to which this protestant receives traffic by interchange.

Recommended by Allen W. Hagerty
Examiner

(Signature) ALLEN W. HAGERTY.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of September 28, A. D. 1964

No. MC-18088 (Sub-No. 29)

FLOYD & BEASLEY TRANSFER COMPANY, INC.,
EXTENSION—CHILDERSBURG

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act, and with our rules and regulations thereunder, a certificate be issued to applicant authorizing operation, in interstate of foreign commerce, as a common carrier by motor vehicle of the commodities described, and in the manner described in the findings in the said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

It is further ordered, That unless compliance is made by applicant with the requirements of section 215, 217, and 221(c) of the act within 90 days after the date of service of a notice to the parties that this order has become effective as the order of the Commission, or within such additional time as may be authorized by the Commission, the grant of authority made in said report shall be considered as null and void and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

Harold D. McCoy,
Secretary

(Seal)

APPENDIX C

No. MC-18088 (Sub-No. 29)

FLOYD & BEASLEY TRANSFER COMPANY, INC.,
EXTENSION—CHILDERSBURG

Decided March 11, 1965

Public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of general commodities with certain exceptions, between Sylacauga, Talladega, Childersburg, and Sycamore, Ala., on the one hand, and, on the other, Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina. Application denied.

John W. Cooper, A. Alvis Layne, and *Walter T. Evans* for applicant.

Maurice F. Bishop, Bates Block, Lennox O. Boyles, John P. Carlton, Frank A. Graham, Jr., Harold G. Hernly, Harold G. Hernly, Jr., Leroy M. Kennedy, Joe C. Morris, Allen Post, Guy H. Postell, R. J. Reynolds III, Monty Schumacher, and *J. B. Smiley* for protestants.

Report of the Commission

DIVISION 1, COMMISSIONERS HUTCHINSON, TUCKER, AND BROWN

HUTCHINSON, *Commissioner:*

Applicant and a number of protestants filed exceptions to the examiner's report and recommended order, and numerous parties filed replies thereto. Our conclusions differ from those recommended.

By application filed October 10, 1962, Floyd & Beasley Transfer Company, Inc., of Sycamore, Ala., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce as a common carrier by motor vehicle, over irregular routes, of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment) between Sylacauga, Talladega, Childersburg, and Sycamore, Ala. (hereinafter referred to as the four points), on the one hand, and, on the other, Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina. Twenty-six motor carriers[1] oppose the application. All parties will be referred to by short titles.

The examiner recommended that authority be granted (1) from Sylacauga and Sycamore to Chattanooga, Atlanta, and points in South Carolina, (2) between Sylacauga and Sycamore, on the one hand, and, on the other, Anniston, and (3) between Childersburg and Talladega, on the one hand, and, on the other, Chattanooga, Anniston, Atlanta, and points in South Carolina, all restricted against joinder or tacking by applicant with any existing authority for the purpose of providing through service (*a*) between Chattanooga and Atlanta, (*b*) between Birmingham and Atlanta, or (*c*) between Birmingham and Chattanooga. On exceptions applicant maintains that the examiner erred in placing upon applicant the burden of showing that a restriction should not be imposed and urges that the authority granted should be unrestricted. Protestants reply that the general rule against the imposition of tacking restrictions should not apply under circumstances such as those in the present case and that applicant should not be allowed to obtain indirectly what it could not obtain in a specific application for such authority. In their several joint exceptions protestants contend that applicant did not give notice through publication in the Federal Register of the full scope of its proposed operations, that the purported showing of an imbalance of outbound traffic as set forth in exhibit 9 is unsupported by probative evidence, that in many instances shippers are unfamiliar with existing service, and that the evidence does not support a grant of authority, particularly from Childersburg and Talledega and to Anniston and points in South Carolina. Several protestants also argue that any grant of authority should be further restricted in order to preclude service between points in South Carolina and points now served by applicant, and that service to the commercial zones of the named destination points should also be restricted against tacking.

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[1] Malone Freight Lines, Inc., Bowman Transportation, Inc., Overnite Transportation Co., Roadway Express, Inc., Cotton States Motor Lines, Inc., doing business as R. C. Motor Lines of Georgia, Dixie Highway Express, Inc., Baggett Transportation Co., Alabama Highway Express, United Motor Freight Terminal, Inc., Georgia Highway Express, Inc., B. C. Truck Lines, Inc., Akers Motor Lines, Inc., Parrish Dray Lines, Inc., Dixie-Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Eagle Motor Lines, Inc., G.F.A. Transportation Co., Inc., Terminal Transport Co., Johnson Freight Lines Company, Ryder Truck Lines, Dixie Highway Express, Inc., McLean Trucking Co., Nilson Motor Express, Inc., R.C.A. Truck Lines, Inc., R. C. Motor Lines, Inc., and Youngblood Truck Lines, Inc.

Applicant has tendered a reply to protestants' exceptions which does not comply with the provisions of rule 1.15 of the Commission's General Rules of Practice relative to typographical specifications. We note also that the joint exceptions filed by protestants Baggett and Alabama Highway Express are not in conformance with this rule. Although we have at times accepted such pleadings and cautioned the parties that failure to observe the Commission's rules may result in the future rejection of such pleadings, this procedure will not be followed here. At an earlier stage of this proceeding applicant submitted a brief that was not in compliance with rule 1.15. It was rejected by order of the Commission, Commissioner Hutchinson, dated January 24, 1964. Here, in the same proceeding, applicant persists in ignoring this specific rule and the warning implicit in the prior order of the Commission. Such a practice unfairly impedes timely response by other parties and unduly hampers the effective disposition of the matter before this Commission. The affected parties have had ample notice in this very proceeding that we will not accept such pleadings; accordingly, both pleadings will be rejected for failure to conform to the requirements of rule 1.15.

The evidence, the examiner's recommendations, and the pleadings of record have been considered. We find his statement of facts to be accurate in all material respects, and, except as modified herein, we adopt it as our own. Certain facts will be restated to the extent necessary for clarity of discussion.

FACTUAL BACKGROUND

Operations and qualifications of applicant.—Applicant, as pertinent, is authorized to transport textile products outbound from the four points in Alabama. It also holds authority to transport general commodities, with the usual exceptions, over a regular route between Birmingham and Anniston and over irregular routes from Atlanta, Birmingham, Chattanooga, and points in South Carolina inbound to two of the involved origin points, Sycamore and Sylacauga. Thus a grant of this application would allow applicant to give additional service to textile mills for the occasional transportation of general commodities outbound. It would also complement applicant's present inbound service on general commodities and would allow service at two additional points in a small area located approximately 50 miles southeast of Birmingham. Of particular significance to protestant motor carriers, however, is the fact that Atlanta, Birmingham, and Chattanooga are major gateways in the southeastern part of the United States and that unless the grant of authority recommended by the examiner were sufficiently restricted, applicant could by joinder with its present general commodity authority operate from Birmingham to Atlanta, to Chattanooga, and to points in South Carolina; from Chattanooga to Birmingham, to

Atlanta, to Anniston, and to points in South Carolina; and from points in South Carolina to Anniston, to Atlanta, and to Chattanooga.

Applicant operates suitable equipment and is otherwise fit and able properly to conduct the proposed service. It maintains terminals at Sycamore, Birmingham, Atlanta, and Chattanooga, as well as at Greenville, S. C. Less-than-truckload traffic moving from or to the four points would be routed through its Sycamore terminal, and applicant would hold itself out to perform an overnight service between all points to be served directly. Although the examiner stated that applicant has an imbalance of traffic moving *from* the four points, we do not believe that the record supports this conclusion. Applicant's exhibit 9, which purports to show such an imbalance of traffic, was admitted over the objection of protestants. Applicant indicated at first that it would produce underlying documents but subsequently announced that such documents would not be produced. We also note that the exhibit covers only a 2-week period shortly before the hearing and does not appear to be representative of applicant's overall operations. Regardless of its admissibility, however, it is clear that such an exhibit, unsupported by basic documentation, may be accorded little, if any, probative weight. Compare *T.I.M.E. Freight, Inc., Extension—Alternate Route,* 89 M.C.C. 241, 243. It also appears that applicant's balance of freight varies and that 6 months prior to the hearing there was an imbalance of freight moving to the four points. Thus, we cannot conclude that applicant has been shown to have any significant imbalance of traffic with respect thereto.

Shipper evidence.—Only one shipper, Avondale Mills, has traffic from or to Sycamore. While it also operates textile plants at Sylacauga, most of its outbound traffic in general commodities (other than textile products) is from Sycamore and consists of occasional shipments of machinery for repair, worn rollers, and rejected chemicals. It operates 26 tractor-trailer units in private carriage. This shipper uses the services of Georgia Highway and considers this protestant to be a "good carrier." Fourteen other shippers supported additional service to or from Sylacauga. For the most part, however, they desire overnight service to Atlanta. Seven shippers would have some outbound traffic to Chattanooga and five would ship to points in South Carolina. A fertilizer company ships to Chattanooga but utilizes its own equipment as much as possible and has made no investigation of existing service. Several automotive dealers return warranted and other auto parts principally to Atlanta for repair. They desire the fastest possible service in order to receive credits for the returned parts. About five defective or old refurbishable picture tubes are shipped to Atlanta each month by a television concern. Protestant Ryder's service has not been used. A hardware business occasionally requires transportation of defective or repairable water heaters to Chattanooga and Atlanta and desires the convenience of speedy service. A radio station, perhaps every 2 years, has an emergency shipment to Atlanta for the repair of transformers or tape recorders. The telephone company occasionally ships test sets or other equipment to Atlanta for modification but is unaware of the extent of existing common carrier service. Machinery parts are shipped in less-than-truckload lots to the several destinations by a steel foundry which uses Ryder and North Alabama, both of which have good pickup service. While interchange service is not wholly satisfactory because of some delay, there was no evidence that the shipper had used any of the direct service provided by Baggett. Solar Cast, Inc., manufacturers various "stone" building materials. Baggett's pickup service thereon is good, but shipper is dissatisfied with so-called follow through service by interline carriers. Less-than-truckload shipments of swimming pool filters are shipped about once a week during the summer months on a rush basis by another shipper. It is concerned with delays in movements by existing carriers primarily to points beyond the scope of the application. One shipper produces structural and crushed stone, about 20 percent of which moves in less-than-truckload service. It desires overnight delivery and uses Ryder's services infrequently because of damage claims and slow delivery. However, some delays appear to be the result of shipper's specific routing and its complaints were not supported by documentary evidence. A printing company ships newspaper supplements, mostly in truckload lots exempt from the Commission's economic regulation. Printing is completed about 8 days in advance of publication date, and shipper desires a guaranteed delivery time for its less-than-truckload shipments, but this request was declined by Baggett on one particular shipment destined to a point in Ohio.

Eight shippers at Childersburg and eight at Talladega support the application, and several desire both outbound and inbound general commodity service. Their overall transportation requirements are similar to those of the shippers at Sylacauga, and as their testimony has been set forth in detail in the examiner's report, it will not be repeated here. In short, they desire overnight service and their complaints about existing carriers have related to delays in transit. Certain other evidence in support of service from Birmingham was adduced; however, it will not be discussed for the reasons set forth in our conclusions herein.

Existing motor service.—The 26 protestant motor carriers hold appropriate commodity authority and operate in whole or in part from and to the involved points, principally over regular routes. Several carriers operate from and to the three noted southeastern gateways and are principally concerned with the service that applicant could provide thereat through tacking.

Baggett is a regular-route carrier providing less-than-truckload service and is able to spot 12 trailers at its Sylacauga terminal. Seven trailers, three tractors, and two pickups are also stationed there; however, the terminal operates on a marginal basis with an unprofitable volume of outbound traffic. It serves from and to both Atlanta and Chattanooga and Sylacauga and Childersburg but originates only a small volume of traffic at the latter two points. On outbound shipments, generally to points beyond those involved in this application, Baggett during a representative period delivered 125 shipments in 1-day service and 181 shipments in 2-day service. During a representative 6-month period it transported about 15,500,000 pounds of lading from Birmingham to Chattanooga, 32,800,000 pounds from Chattanooga to Birmingham; 35,800,000 pounds from Birmingham to Atlanta, and 42,000,000 pounds from Atlanta to Birmingham; 4,300,000 pounds from Birmingham to Sylacauga and Childersburg and 2,500,000 pounds in the reverse direction. Alabama Highway, a carrier operated by Baggett, serves between the four points and Chattanooga and Atlanta; however, it has handled predominantly truckload traffic from this area.

Ryder, a regular-route carrier, serves the four points, with the exclusion of Talladega, as part of a daily peddle run which originates at its Birmingham terminal. During a representative month it handled about 80,000 pounds of less-than-truckload outbound shipments and 205,000 pounds inbound. Considering all points embraced in the authority sought by applicant, Ryder transported 19,974,600 pounds of traffic which produced a revenue of $271,000 during that month, including traffic interlined with applicant at Birmingham or Atlanta, which would be subject to diversion.

Bowman holds authority to serve all points involved but generally interchanges less-than-truckload traffic at Birmingham in serving the four points. Malone's authority is similar except that it may not serve Chattanooga. Alabama Highway may serve all involved points except those in South Carolina.

Anniston-Talladega is a local, regular-route carrier serving between Talladega, Anniston, and Birmingham. It actively solicits less-than-truckload traffic in the Talladega area and participates in interchange of traffic at Birmingham and Anniston with other protestant carriers such as Dixie-Ohio, Dixie Highway, Baggett, Georgia Highway, or United for movements to or from points at which service is required. It now serves several of the supporting shippers and has received no complaints or requests for service within the scope of its authority that it was unable to provide.

Georgia Highway, by virtue of its control of B. C. Truck Lines, may serve the four points and other involved points except those in South Carolina. It serves Talladega daily and performs an overnight, less-than-truckload service from and to its Atlanta terminal on the predominant number of shipments, including those moving to six shippers who appeared in support of this application during a representative 10-week period. Protestant transports 417 shipments inbound to Talladega, and 389 shipments outbound therefrom during a similar 12-week period. Seventy-eight shipments also move to Sylacauga and Childersburg.

Dixie Highway serves Sylacauga and Talladega as off-route points; however, its service is restricted to shipments of 5,000 pounds or more. Shipments totaling about 500,000 pounds were transported from Talladega during a 14-week period and a somewhat greater amount moved from Sylacauga during a period of 8 months. Parrish may operate between the four points and points in South Carolina. It maintains a call station at Birmingham at which it stations four to six trailers. It could therefore handle any of the shippers' traffic to points in South Carolina.

Certain protestants do not serve the four points directly; however, collectively they interchange such traffic with other protestant carriers and also participate in interline traffic moving to and from Birmingham.

DISCUSSION AND CONCLUSIONS

Before a grant of common carrier authority may be made, an applicant must establish by convincing evidence a public need for the proposed operation. Within this requirement an important element for our consideration is whether existing carriers are unable or unwilling to provide a reasonable adequate service.

The application as filed seeks irregular-route authority between the four points, on the one hand, and, on the other, Anniston, Atlanta, Chattanooga, and points in South Carolina. It was developed at the hearing that one of applicant's purposes in filing for such authority is to enable it, by joinder with existing rights, to serve shippers located at Birmingham. It also has become apparent that applicant aspires to an unrestricted grant of authority that would allow it, by tacking, to operate between the three major southeastern gateways of Atlanta, Birmingham, and Chattanooga.

It may be presumed that regular-route carriers of general commodities will combine an additional service route with existing routes as part of a complete system; however, that presumption does not always carry over to applications for an extension of irregular-route authority. This is not the ordinary and normal method of requesting an extension of irregular-route authority beyond the specific points sought in the application, and we agree with protestants that the application as filed fails to state, in part, the full scope of applicant's proposed operation. Possibly interested parties were not in law given adequate notice or the opportunity to appear in opposition to the proceeding, and protestant carriers of record were not given a fair opportunity to present rebuttal evidence, particularly in regard to the extent of their existing services from and to Birmingham. See *Blue Ridge Transfer Co., Inc., Extension—Sumter, S. C.,* 84 M.C.C. 239, and *Kreider Truck Service, Inc., Ext.—Feed Ingredients,* 92 M.C.C. 662. Under these circumstances, the application must stand or fall on applicant's proof of a need for service from and to the origin and destination points named in the application.

We do not agree with the examiner's conclusions that the considered shippers require an overnight, less-than-truckload service to the extent that it cannot be provided by existing carriers, including the applicant herein. Considering the most significant supporting evidence relating to shippers' needs at Sylacauga, the record fails to convince us that shippers there or at the other four points have a real need for overnight service on their less-than-truckload traffic or that existing carriers cannot provide that service to a reasonable degree. It also appears that many of the shippers are primarily interested in the outbound transportation of volume, rather than less-than-truckload shipments. The majority of these shippers have not tried or are unaware of the variety of services now available from the regular-route as well as the irregular-route protestant carriers which serve one or more of the four points. Further, where existing service has been tried the shippers' generalized complaints as to time in transit were not supported by documentary evidence, whereas several protestants presented documented proof of their representative transit times. Of the two principal carriers serving the four points, Georgia Highway performs overnight service on most of its traffic and Baggett frequently provides overnight service, with the predominant number of shipments moving in second day service. The record does not reflect an overall pattern of service deficiencies which in our opinion warrants a grant of additional authority to applicant. Moreover, we are not convinced that applicant's proposed, irregular-route service would better meet the transportation needs of the supporting shippers. In fact, it appears that if the shippers were to receive an improved service in the transportation of their less-than-truckload general freight, such service would be in the nature of an improved regular-route service that would be inconsistent with the irregular-route type of authority requested and proposed herein. Compare *Motor Common Carriers of Property—Routes and Service*, 88 M.C.C. 415. Although numerous shippers have asserted a need for the transportation of expedited or emergency shipments, the record as a whole indicates that such shipments in fact occur infrequently, that no real need for expedited service has been shown, that the overall volume of inbound and outbound less-than-truckload shipments is relatively low, and that shippers merely have the normal desire to have their traffic moved as soon as possible.

In summary, we believe the record as a whole shows no material inadequacy in the existing single-line and joint-line motor services available both from opposing carriers who have been used and have provided reasonably adequate service as well as from those carriers whose services have not yet been tried. In our opinion applicant has failed to establish that its proposed service would be responsive to a public need and, accordingly, we conclude that the application should be denied.

FINDINGS

We find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

An appropriate order will be entered.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 11th day of March A. D. 1965.

No. MC-18088 (Sub-No. 29)

FLOYD & BEASLEY TRANSFER COMPANY, INC.,
EXTENSION—CHILDERSBURG

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application, be and it is hereby, denied.

It is further ordered, That the tendered reply of applicant and the tendered joint exceptions of protestants Baggett Transportation Company and Alabama Highway Express, Inc., be, and they are hereby, rejected for failure to conform to the requirements of Rule 1.15 of the Commission's General Rules of Practice relative to the printing or pleadings more than 50 pages in length.

By the Commission, division 1.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

APPENDIX D

Order

Service Date
April 13, 1965

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 31st day of March, A. D. 1965.

No. MC-18088 (Sub-No. 29)

Floyd & Beasley Transfer Company, Inc.,
Extension—Childersburg
(Sycamore, Ala.)

Upon consideration of the record in the above-styled proceeding, and good cause appearing therefor, and upon our own motion,

It is ordered, That the report and order previously served in this proceeding March 18, 1965, be, and they are hereby, vacated and set aside, and that the above-styled proceeding be, and it is hereby, reopened for reconsideration on the existing record.

By the Commission, Division 1, Acting as an Appellate Division.

Bertha F. Armes,
(Seal) *Acting Secretary.*

APPENDIX E

Order

Service Date
July 26, 1965

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 14th day of July, A. D. 1965.

No. MC-18088 (Sub-No. 29)

Floyd & Beasley Transfer Company, Inc.,
Extension—Childersburg
(Sycamore, Ala.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed June 8, 1965, for further hearing;

(2) Joint reply by McLean Trucking Company, Nilson Motor Express, R. C. Motor Lines, Inc., and Youngblood Truck Lines, Inc., protestants, filed June 28, 1965;

(3) Reply by Parrish Dray Line, Inc., protestant, filed June 28, 1965;

(4) Joint reply by Akers Motor Lines, Inc., Johnson Freight Lines Company, Inc., Overnite Transportation Company, Roadway Express, Inc., Ryder Truck Lines, Inc., and Terminal Transport Company, Inc., protestants, filed June 28, 1965;

(5) Reply by Georgia Highway Express, Inc., protestant, filed June 28, 1965, embracing motion to strike portions of petition in (1) above;

(6) Joint reply by Baggett Transportation Company and Alabama Highway Express, Inc., protestants, filed

June 28, 1965, embracing motion to strike portions of petition in (1) above;

(7) Joint reply by Malone Freight Lines, Inc., Bowman Transportation, Inc., Dixie Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Eagle Motor Lines, Inc., and Georgia-Florida-Alabama Transportation Co., Inc., protestants, filed June 29, 1965, embracing motion to strike portions of petition in (1) above;

and good cause appearing therefor:

It is ordered, That the motions to strike in (5), (6), and (7) above, be, and they are hereby, overruled for the reason that the pleading sought to be stricken is in substantial compliance with the Commission's General Rules of Practice and is entitled to consideration on its merits;

It is further ordered, That the said petition be, and it is hereby, denied, for the reason that no sufficient or proper cause appears for reopening the proceeding for further hearing.

By the Commission, Division 1, acting as an Appellate Division.

H. Neil Garson,
Secretary.

(Seal)

APPENDIX F

No. MC-18088 (Sub-No. 29)

Floyd & Beasley Transfer Company, Inc., Extension—Childersburg

Decided July 14, 1965

On reconsideration, findings in prior report, 98 M.C.C. 304, decided March 11, 1965, affirmed. Public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle, over irregular routes, of general commodities with certain exceptions, between Sylacauga, Talladega, Childersburg, and Sycamore, Ala., on the one hand, and, on the other, Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in South Carolina. Application denied.

Appearances as shown in prior report.

Report of the Commission on Reconsideration

Division 1, Acting as an Appellate Division,
Commissioners Bush, Tucker and Brown

Brown, *Commissioner:*

By application filed October 10, 1962, Floyd & Beasley Transfer Company, Inc., of Sycamore, Ala., seeks a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce as a common carrier by more vehicle, over irregular routes, of general commodities (except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment) between Sylacauga, Talladega, Childersburg, and Sycamore, Ala. (hereinafter referred to as the four points), on the one hand, and, on the other, Chattanooga, Tenn., Anniston, Ala., Atlanta, Ga., and points in

South Carolina. Twenty-six motor carriers[1] oppose the application. All partes will be referred to by short titles.

In the prior report, 98 M.C.C. 304, decided March 11, 1965, division 1 inadvertently failed to give proper consideration to certain pleadings filed in this proceeding. By order of March 31 1965, the prior report and order was vacated and set aside and the proceeding was reopened for reconsideration on the existing record in order that the proceeding might be decided upon the merits after full consideration of all pleadings.

Applicant and a number of protestants filed exceptions to the examiner's report and recommended order, and numerous parties filed replies thereto. Our conclusions differ from those recommended.

The examiner recommended that authority be granted (1) from Sylacauga and Sycamore to Chattanooga, Atlanta, and points in South Carolina, (2) between Sylacauga and Sycamore, on the one hand, and, on the other, Anniston, and (3) between Childersburg and Talladega, on the one hand, and, on the other, Chattanooga, Anniston, Atlanta, and points in South Carolina, all restricted against joinder or tacking by applicant with any existing authority for the purpose of providing through service (*a*) between Chattanooga and Atlanta, (*b*) between Birmingham and Atlanta, or (*c*) between Birmingham and Chattanooga. On exceptions applicant maintains that the examiner erred in placing upon applicant the burden of showing that a restriction should not be imposed and urges that the authority granted should be unrestricted. Protestants reply that the general rule against the imposition of tacking restrictions should not apply under circumstances such as those in the present case and that applicant should not be allowed to obtain indirectly what it could not obtain in a specific application for such authority. In their several joint exceptions protestants contend that applicant did not give notice through publication in the Federal Register of the full scope of its proposed operations, that the purported showing of an imbalance of outbound traffic as set forth in exhibit 9 is unsupported by probative evidence, that in many instances shippers are unfamiliar with existing service, and that the evidence does not support a grant of authority, particularly from Childersburg and Talladega and to Anniston and points in South Carolina. Several protestants also argue that any grant of authority should be further restricted in order to preclude service between points in South Carolina and points now served by applicant, and that service to the commercial zones of the named destination points should also be restricted against tacking. In reply applicant takes issue with the various contentions of the protestants, argues that the supporting shippers are not receiving adequate service particularly in regard to their less-than-truckload traffic, and reasserts its argument made on exceptions.

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[1] Malone Freight Lines, Inc., Bowman Transportation, Inc., Overnite Transportation Co., Roadway Express, Inc., Cotton States Motor Lines, Inc., doing business as R. C. Motor Lines of Georgia, Dixie Highway Express, Inc., Baggett Transportation Co., Alabama Highway Express, United Motor Freight Terminal, Inc., Georgia Highway Express, Inc., B. C. Truck Lines, Inc., Akers Motor Lines, Inc., Parrish Dray Lines, Inc., Dixie-Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Eagle Motor Lines, Inc., G.F.A. Transportation Co., Inc., Terminal Transport Co., Johnson Freight Lines Company, Ryder Truck Lines, Dixie Highway Express, Inc., McLean Trucking Co., Nilson Motor Express, Inc., R.C.A. Truck Lines, Inc., R. C. Motor Lines, Inc., and Youngblood Truck Lines, Inc.

The evidence, the examiner's recommendations, and the pleadings have been considered. We find the examiner's statement of facts to be accurate in all material respects, and, except as modified herein, we adopt it as our own. Certain facts will be restated to the extent necessary for clarity of discussion.

FACTUAL BACKGROUND

Operations and qualifications of applicant.—Applicant, as pertinent, is authorized to transport textile products outbound from the four points in Alabama. It also holds authority to transport general commodities, with the usual exceptions, over a regular route between Birmingham and Anniston and over irregular routes from Atlanta, Birmingham, Chattanooga, and points in South Carolina inbound to two of the involved origin points, Sycamore and Sylacauga. Thus a grant of this application would allow applicant to give additional service to textile mills for the occasional transportation of general commodities outbound. It would also complement applicant's present inbound service on general commodities and would allow service at two additional points in a small area located approximately 50 miles southeast of Birmingham. Of particular significance to protestant motor carriers, however, is the fact that Atlanta, Birmingham, and Chattanooga are major gateways in the southeastern part of the United States and that unless the grant of authority recommended by the examiner were sufficiently restricted, applicant could by joinder with its present general commodity authority operate from Birmingham to Atlanta, to Chattanooga, and to points in South Carolina; from Chattanooga to Birmingham, to Atlanta, to Anniston, and to points in South Carolina; and from points in South Carolina to Anniston, to Atlanta, and to Chattanooga.

Applicant operates suitable equipment and is otherwise fit and able properly to conduct the proposed service. It maintains terminals at Sycamore, Birmingham, Atlanta, and Chattanooga, as well as at Greenville, S. C. Less-than-truckload traffic moving from or to the four points would be routed through its Sycamore terminal, and applicants would hold itself out to perform an overnight service between all points to be served directly. Although the examiner stated that applicant has an imbalance of traffic moving *from* the four points, we do not believe that the record supports this conclusion. Applicant's exhibit 9, which purports to show such imbalance of traffic, was admitted over the objection of protestants. Applicant indicated at first that it would produce underlying documents but subsequently announced that such documents would not be produced. We also note that the exhibit covers only a 2-week period shortly before the hearing and does not appear to be representative of applicant's overall operations. Regardless of its admissibility, however, it is clear that such an exhibit, unsupported by basic documentation, may be accorded little, if any, probative weight. Compare *T.I.M.E. Freight, Inc., Extension—Alternate Route,* 89 M.C.C. 241, 243. It also appears that applicant's balance of freight varies and that 6 months prior to the hearing there was an imbalance of freight moving to the four points. Thus, we cannot conclude that applicant has been shown to have any significant imbalance of traffic with respect thereto.

Shipper evidence.—Only one shipper, Avondale Mills, has traffic moving from or to Sycamore. While it also operates textile plants at Sylacauga, most of its outbound traffic in general commodities (other than textile products) is from Sycamore and consists of occasional shipments of machinery for repair, worn rollers, and rejected chemicals. It operates 26 tractor-trailer units in private carriage. This shipper uses the services of Georgia Highway and considers this protestant to be a "good carrier." Fourteen other shippers supported additional service to or from Sylacauga. For the most part, however, they desire overnight service to Atlanta. Seven shippers would have some outbound traffic to Atlanta. Seven shippers would have some outbound traffic to Chattanooga and five would ship to points in South Carolina. A fertilizer company ships to Chattanooga but utilizes its own equipment as much as possible and has made no investigation of existing service. Several automotive dealers return warranted and other auto parts principally to Atlanta for repair. They desire the fastest possible service in order to receive credits for the returned parts. About five defective or old refurbishable picture tubes are shipped to Atlanta each month by a television concern. Protestant Ryder's service has not been used. A hardware business occasionally requires transportation of defective or repairable water heaters to Chattanooga and Atlanta and desires the convenience of speedy service. A radio station, perhaps every 2 years, has an emergency shipment to Atlanta for the repair of transformers or tape recorders. The telephone company occasionally ships test sets or other equipment to Atlanta for modification but is unaware of the extent of existing common carrier service. Machinery parts are shipped in less-than-truckload quantities to the several destinations by a steel foundry which uses Ryder and North Alabama, both of which have good pickup service. While interchange service is not wholly satisfactory because of some delay, there was no evidence that the shipper had used any of the direct service provided by Baggett. Solar Cast, Inc., manufacturers various "stone" building materials. Baggett's pickup service thereon is good, but shipper is dissatisfied with so-called follow through service by interline carriers. Less-than-truckload shipments of swimming pool filters are shipped about once a week during the summer months on a rush basis by another shipper. It is concerned with delays in movements by existing carriers primarily to points beyond the scope of the application. One shipper produces structural and crushed stone, about 20 percent of which moves in less-than-truckload service. It desires overnight delivery and uses Ryder's services infrequently because of damage claims and slow delivery. However, some delays appear to be the result of shipper's specific routing and its complaints were not supported by documentary evidence. A printing company ships newspaper supplements, mostly in truckload lots exempt from the Commission's economic regulation. Printing is completed about 8 days in advance of publication date, and shipper desires a guaranteed delivery time for its less-than-truckload shipments, but this request was declined by Baggett on one particular shipment destined to a point in Ohio.

Eight shippers at Childersburg and eight at Talladega support the application, and several desire both outbound and inbound general commodity service. Their overall transportation requirements are similar to those of the shippers at Sylacauga, and as their testimony has been set forth in detail in the examiner's report, it will not be repeated here. In short, they desire overnight service and their complaints about existing carriers have related to delays in transit. Certain other evidence in support of service from Birmingham was adduced; however, it will not be discussed for the reasons set forth in our conclusions herein.

Existing motor service.—The 26 protestant motor carriers hold appropriate commodity authority and operate in whole or in part from and to the involved points, principally over regular routes. Several carriers operate from and to the three noted southeastern gateways and are principally concerned with the service that applicant could provide thereat through tacking.

Baggett is a regular-route carrier providing less-than-truckload service and is able to spot 12 trailers at its Sylacauga terminal. Seven trailers, three tractors, and two pickups are also stationed there; however, the terminal operates on a marginal basis with an unprofitable volume of outbound traffic. It serves from and to both Atlanta and Chattanooga and Sylacauga and Childersburg but originates only a small volume of traffic at the latter two points. On outbound shipments, generally to points beyond those involved in this application, Baggett during a representative period delivered 125 shipments in 1-day service and 181 shipments in 2-day service. During a representative 6-month period it transported about

15,500,000 pounds of lading from Birmingham to Chattanooga, 32,800,000 pounds from Chattanooga to Birmingham; 35,800,000 pounds from Birmingham to Atlanta, and 42,000,000 pounds from Atlanta to Birmingham; 4,300,000 pounds from Birmingham to Sylacauga and Childersburg and 2,500,000 pounds in the reverse direction. Alabama Highway, a carrier operated by Baggett, serves between the four points and Chattanooga and Atlanta; however, it has handled predominantly truckload traffic from this area.

Ryder, a regular-route carrier, serves the four points, with the exclusion of Talladega, as part of a daily peddle run which originates at its Birmingham terminal. During a representative month, it handled about 80,000 pounds of less-than-truckload outbound shipments and 205,000 pounds inbound. Considering all points embraced in the authority sought by applicant, Ryder transported 19,874,600 pounds of traffic which produced a revenue of $271,000 during that month, including traffic interlined with applicant at Birmingham or Atlanta, which would be subject to diversion.

Bowman holds authority to serve all points involved but generally interchanges less-than-truckload traffic at Birmingham in serving the four points. Malone's authority is similar except that it may not serve Chattanooga. Alabama Highway may serve all the involved points except those in South Carolina.

Anniston-Talladega is a local, regular-route carrier serving between Talladega, Anniston, and Birmingham. It actively solicits less-than-truckload traffic in the Talladega area and participates in interchange of traffic at Birmingham and Anniston with other protestant carriers such as Dixie-Ohio, Dixie Highway, Baggett, Georgia Highway, or United for movements to or from points at which service is required. It now serves several of the supporting shippers and has received no complaints or requests for service within the scope of its authority that it was unable to provide.

Georgia Highway, by virtue of its control of B. C. Truck Lines, may serve the four points and other involved points except those in South Carolina.. It serves Talladega daily and performs an overnight less-than-truckload service from and to its Atlanta terminal on a predominant number of shipments handled, including those moving to six shippers who appeared in support of this application, during a representative 10-week period. Protestant transported 417 shipments inbound to Talladega, and 389 shipments outbound therefrom during a similar 12-week period. Seventy-eight shipments also moved to Sylacauga and Childersburg.

Dixie Highway serves Sylacauga and Talladega as off-route points; however, its service is restricted to shipments of 5,000 pounds or more. Shipments totaling about 500,000 pounds were transported from Talladega during a 14-week period and a somewhat greater amount moved from Sylacauga during a period of 8 months. Parrish may operate between the four points and points in South Carolina. It maintains a call station at Birmingham at which it stations four to six trailers. It could therefore handle any of the shippers' traffic to points in South Carolina.

Certain protestants do not serve the four points directly; however, collectively they interchange such traffic with other protestant carriers and also participate in interline traffic moving to and from Birmingham.

DISCUSSION AND CONCLUSIONS

Before a grant of common carrier authority may be made, an applicant must establish by convincing evidence a public need for the proposed operation. Within this requirement an important element for our consideration is whether existing carriers are unable or unwilling to provide a reasonably adequate service.

The application as filed seeks irregular-route authority between the four points on the one hand, and, on the other, Anniston, Atlanta, Chattanooga, and points in South Carolina. It was developed at the hearing that one of applicant's purposes in filing for such authority is to enable it, by joinder with existing rights, to serve shippers located at Birmingham. It also has become apparent that applicant aspires to an unrestricted grant of authority that would allow it, by tacking, to operate between the three major southeastern gateways of Atlanta, Birmingham, and Chattanooga.

It may be presumed that regular-route carriers of general commodities will combine an additional service route with existing routes as part of a complete system; however, that presumption does not always carry over to applications for an extension of irregular-route authority. This is not the ordinary and normal method of requesting an extension of irregular-route authority beyond the specific points sought in the application, and we agree with protestants that the application as filed fails to state, in part, the full scope of applicant's proposed operation. Possibly interested parties were not in law given adequate notice or the opportunity to appear in opposition to the proceeding, and protestant carriers of record were not given a fair opportunity to present rebuttal evidence, particularly in regard to the extent of their existing services from and to Birmingham. See *Blue Ridge Transfer Co., Inc., Extension—Sumter, S. C.*, 84 M.C.C. 239, and *Kreider Truck Service, Inc., Ext.—Feed Ingredients*, 92 M.C.C. 662. Under these circumstances, the application must stand or fall on applicant's proof of a need for service from and to the origin and destination points named in the application.

We do not agree with the examiner's conclusions that the considered shippers require an overnight, less-than-truckload service to the extent that it cannot be provided by existing carriers, including the applicant herein. Considering the most significant supporting evidence relating to shippers' needs at Sylacauga, the record fails to convince us that shippers there or at the other four points have a real need for overnight service on their less-than-truckload traffic or that existing carriers cannot provide that service to a reasonable degree. It also appears that many of the shippers are primarily interested in the outbound transportation of volume, rather than less-than-truckload shipments. The majority of these shippers have not tried or are unaware of the variety of services now available from the regular route as well as the irregular-route protestant carriers which serve one or more of the four points. Further where existing service has been tried, shippers' generalized complaints as to time in transit were not supported by documentary evidence, whereas several protestants presented documented proof of their representative transit times. Of the two principal carriers serving the four points, Georgia Highway performs overnight service on most of its traffic and Baggett frequently provides overnight service, with the predominant number of shipments moving in second day service. The record does not reflect an overall pattern of service deficiencies which in our opinion warrants a grant of additional authority to applicant. Moreover, we are not convinced that applicant's proposed, irregular-route service would better meet the transportation needs of the supporting shippers. In fact, it appears that if the shippers were to receive an improved service in the transportation of their less-than-truckload general freight, such service would be in the nature of an improved regular-route service that would be inconsistent with the irregular-route type of authority requested and proposed herein. Compare *Motor Common Carriers of Property—Routes and Service*, 88 M.C.C. 415. Although numerous shippers have asserted a need for the transportation of expedited or emergency shipments, the record as a whole indicates that such shipments in fact occur infrequently, that no real need for expedited service has been shown, that the overall volume of inbound and outbound less-than-truckload shipments is relatively low, and that shippers merely have the normal desire to have their traffic moved as soon as possible.

In summary, we believe the record as a whole shows no material inadequacy in the existing single-line and joint-line motor services available both from opposing carriers who have been used and have provided reasonably adequate service as well as from those carriers who services have not yet been tried. In our opinion applicant has failed to establish that its proposed service would be responsive to a public need and, accordingly, we conclude that the application should be denied.

FINDINGS

On reconsideration, we find that applicant has failed to establish that the present or future public convenience and necessity require the proposed operation, and that the application should be denied.

An appropriate order will be entered.

VICE CHAIRMAN BUSH concurs in the result.

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 14th day of July A. D. 1965.

No. MC-18088 (Sub-No. 29)

FLOYD & BEASLEY TRANSFER COMPANY, INC.,
EXTENSION—CHILDERSBURG

It appearing, That by order of March 31, 1965, the Commission, Division 1, vacated and set aside the report and order previously served in this proceeding on March 18, 1965, and reopened the proceeding for reconsideration on the existing record;

It further appearing, That reconsideration of the matters and things involved in this proceeding has been given, and that said division, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said application be, and it is hereby, denied.

By the Commission, division 1, Acting as an Appellate Division.

H. Neil Garson,
(Seal) *Secretary*

APPENDIX G

Order

Service Date
November 23, 1965

At a Session of the Interstate Commerce Commission, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 12th day of November, A. D. 1965.

No. MC-18088 (Sub-No. 29)

Floyd & Beasley Transfer Company, Inc.,
Extension—Childersburg
(Sycamore, Ala.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed September 15, 1965, for reconsideration;

(2) Joint reply by Akers, Motor Lines, Inc., Johnson Freight Lines Company, Inc., Overnight Transportation Company, Roadway Express, Inc., Ryder

Truck Lines, Inc., and Terminal Transport Company, Inc., protestants, filed October 1, 1965;

(3) Reply by Parrish Dray Line, Inc., protestant, filed October 5, 1965;

(4) Joint reply by McLean Trucking Company, Nilson Motor Express, R. C. Truck Lines, Inc., and Youngblood Truck Lines, Inc., protestants, filed October 18, 1965;

(5) Joint reply by Baggett Transportation Company, and Alabama Highway Express, Inc., protestants, filed October 18, 1965;

(6) Reply by Georgia Highway Express, Inc., protestant, filed October 18, 1965;

(7) Joint reply by Bowman Transportation, Inc., Malone Freight Lines, Inc., Dixie Ohio Express, Inc., Anniston-Talladega Motor Express, Inc., Eagle Motor Lines, Inc., and Georgia-Florida-Alabama Transportation Co., Inc., protestants, filed October 19, 1965;

and good cause appearing therefor:

It is ordered, That the said petition be, and it is hereby, denied for the reason that the findings of Division 1, acting as an Appellate Division, in its report on reconsideration, are in accordance with the evidence and the applicable law.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary

(SEAL)

APPENDIX H

[¶317(5)]

[Testimony at Public Hearings]

(5) Any finding, report, or requirement of an individual Commissioner or board, with respect to any matter so assigned or referred involving the taking of testimony at a public hearing, shall be accompanied by a statement in writing of the reasons therefor, together with a recommended order, which shall be filed with the Commission. Copies therof shall be served upon interested parties (including, in proceedings under Part II, persons specified in Section 205(e)), who may file exceptions thereto, but if within 20 days after service upon such person, or within such further period as the Commission or a duly designated division thereof may authorize, no exceptions shall have been filed, such recommended order shall become the order of the Commission and become effective unless within such period the order shall have been stayed or postponed by the Commission or by a duly designated division thereof. The Commission, or a duly designated division thereof, upon its own motion may, and where exceptions are filed it shall, reconsider the matter either upon the same record or after further hearing, and such recommended order shall thereupon be stayed or postponed pending final determination thereof. When deemed by the Commission to be appropriate for the efficient and orderly conduct of its business, it may authorize duly designated employee boards to perform, under this paragraph, functions of the same character as those which may be performed thereunder by duly designated divisions. *(Subsection (5) as amended September 14, 1961.)*

[¶317(6)]

[Rehearings; Rearguments; Reconsiderations]

(6) After a decision, order, or requirement shall have been made by the Commission, a division, an individual

Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of a matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within 20 days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

[¶ 317(7)]

[Modification of Reports]

(7) If after rehearing, reargument, or reconsideration of a decision order, or requirement of a division, an individual Commissioner, or board it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission or appellate division may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after rehearing, reargument, or reconsideration, reversing, changing, or modifying the original determination shall be subject to the same provisions with respect to rehearing, reargument, or reconsideration as an original order.

[¶ 317(8)]

[Stay of Orders]

(8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the specia order of the Commission.

[¶ 317(9)]

[Judicial Review]

(9) When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with

respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

[¶ 317(10)]

[Reference to Examiner]

(10) Any matter arising in the administration of Part II of this Act as to which a hearing is to be held may be referred to an examiner of the Commission, for action thereon, subject to the conditions and limitations provided in this section in the case of reference of work, business or functions, as to which a hearing is to be held, to an individual Commissioner or board.

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*
v.
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO AFFIRM

Akers Motor Lines, Inc.
Johnson Freight Lines Company, Inc.
McLean Trucking Company
Overnite Transportation Company
R. C. Motor Lines, Inc.
Terminal Transport Company, Inc.

GUY H. POSTELL
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Counsel for Named Motor Carrier Appellees

November 30, 1966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*
v.
THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Akers Motor Lines, Inc., Johnson Freight Lines Company, Inc., McLean Trucking Company, Overnite Transportation Company, R. C. Motor Lines, Inc., and Terminal Transport Company, Inc., intervenors in the district court proceeding below, move that the judgment of the district court be affirmed.

Statement

This is a direct appeal from a judgment (JS 1a) of a three-judge district court dismissing appellant's suit to set aside an order of the Interstate Commerce Commission entered in *Floyd & Beasley Transfer Co., Inc., Extension — Childersburg*, 99 M.C.C. 258 (1965). In this decision, the Commission denied an application filed on October 10, 1962, by appellant, wherein appellant sought a certificate of public convenience and necessity authorizing operation in interstate or foreign commerce as a common carrier, by motor vehicle, over irregular routes, transporting general commodities (except those of unusual value, Classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities requiring special equipment) between Childersburg, Sycamore, Sylacauga and Talladega, Ala., on the one hand, and, on the other, Chattanooga, Tenn.; Anniston, Ala.; Atlanta, Ga.; and points in South Carolina. Following the presentation of evidence and arguments by the parties, the Commission served its report and order on July 26, 1965, in which it found that appellant had failed to establish present or future public convenience and necessity required the proposed operation, and, consequently, concluded that the aforesaid application should be denied.

The six carriers in whose behalf this Motion to Affirm is presented participated in the underlying proceeding before the Commission and as intervening defendants in the three-judge district court case from whose decision this appeal is taken.

At the aforesaid hearings before the Interstate Commerce Commission, appellant offered evidence of the operations it proposed to institute under the certificate it sought from the Commission. It also sponsored evidence from various shippers and receivers of freight who alleged that public convenience and necessity required that the applied for certificate be issued to appellant. Appellees, on whose behalf this Motion is filed, as well as other motor carriers opposed the issuance of this certificate to appellant. These motor carriers offered evidence alleging that public convenience and necessity do not require the operations for which appellant seeks a certificate. An Examiner of the Interstate Commerce Commission conducted the hearings in which the aforesaid evidence was introduced. The Hearing Examiner recommended the authority which appellant sought, subject to restriction. To this report and order, appellees and other motor common carriers took exception. Thereafter, in an order served by the Commission, through its Division 1, the application was unanimously denied in its entirety. To this report and order, appellant filed a petition for reconsideration. By a further order, after additional consideration, Division 1 of the Commission again unanimously denied the application, the effect of which is to conclude that there is no public need for the certificate of public convenience and necessity sought by appellant.

Appellant filed its complaint with the three-judge District Court for the Northern District of Alabama, contending that the Commission's decision to deny its application for the certificate of public convenience and necessity should be overturned as unlawful. By *per curiam* decision dated June 24, 1966, Circuit Judge Walter P. Gewin and District Judges Seybourn H. Lynne and H. H. Grooms affirmed the Commission's decision to deny appellant's application for the certificate of public convenience and necessity.

The thrust of this appeal is to request this Honorable Court to weigh the evidence and substitute its judgment for that of the Interstate Commerce Commission. This is the same position taken by appellant before the District Court below.

Argument

The appeal presents four questions (J.S. 4-5, and 9).

The first two questions challenge the right of the Interstate Commerce Commission to exercise independent judgment of the facts and matters before it, i.e., appellant takes the position that the Commission is bound by the recommendations of the Hearing Examiner. This question is settled by a long, unbroken line of decisions, and the district court properly recognized this authority, to-wit:

> "Heretofore we have expressed our understanding that 'the Commission is not bound by the findings of its hearing officer, but is free to reach conclusions upon the evidence contrary to those of its examiners'.[10]"

Appellant fails utterly to show why this Honorable Court should disturb this sound principle of administrative law.

The third and fourth questions posed by appellant request this Honorable Court to weigh the facts before the Commission and reject the Commission's findings and conclusions based thereon as affirmed by the District Court. Appellant has three times requested the Commission to reconsider and reweigh the facts, and made the same request of the court below. It now asks that this Honorable Court do the same. For the law on this point, we cannot improve on the holding of the three-judge court below, which states:

> "This court has repeatedly stated our appreciation of the limited scope of judicial review to which the parties are entitled[8]. We have also recognized the broad scope of the Commission's

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[8] *Malone Freight Lines, Inc. vs. United States*, 204 F. Supp. 745, 754 (N.D. Ala. 1962) and cases therein cited.

[10] *Eagle Motor Lines, Inc. vs. United States*, 236 F. Supp. 502, 504 (N.D. Ala. 1964).

> discretion in granting or denying certificates of public convenience and necessity as provided by section 207(a) of the Interstate Commerce Act[9]. In *Floyd & Beasley Transfer Company v. United States,* 185 F. Supp. 390, 395 (N.D. Ala. 1960) we stated:
>
> > 'By a long line of cases it is authoritatively settled that Congress has delegated to the Commission broad and exclusive discretion to determine public convenience and necessity and that it is not the function of this court on review to resolve relevant factual issues entrusted to the expertise of such administrative body.' (Citations omitted.)"

Furthermore, the District Court (as had the Commission before it) made a "*** painstaking review of the whole, voluminous record in obedience to the command of the Administrative Procedure Act ***" and concluded there was a rational basis for the Commission's order.

The sole question really is whether on the evidence there is a definite need for the service proposed. The law on this point is well settled. The answer to this question is left to the expertise of the Commission after weighing as it painstakingly did, all of the evidence. See: *Interstate Commerce Commission v. Parker*, 326 U.S. 60, 65.

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[9] Section 207(a) of the Interstate Commerce Act (49 U.S.C.A. 307(a) provides in part as follows:

> 'Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to control the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: ***.".

Conclusion

It is respectfully submitted that none of the questions raised by appellant's Jurisdictional Statement is sufficiently substantial to warrant plenary consideration of this court. The judgment of the district court should be affirmed.

Respectfully submitted,

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November 30, 1966

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., APPELLANT
v.
UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (256 F. Supp. 23, J.S. 1a-5a) dismissing appellant's suit to set aside an order of the Interstate Commerce Commission (J.S. 91a-92a; report at 99 M.C.C. 258, J.S. 80a-91a),[1] denying appellant's application for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle of general commodities over irregular routes between four points in Alabama and points in four southeastern states.

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[1] The Commission had *sua sponte* reopened the case on the existing record (J.A. 77a), see text, p. 3, *infra*. Its previous report and order are found at J.A. 64a-76a.

Floyd & Beasley (F. & B), the appellant, is a common carrier by motor vehicle operating out of Sycamore, Alabama. It holds authority to transport general commodities, with the usual exceptions, over a regular route between Birmingham and Anniston, Alabama, and over irregular routes from Atlanta (Georgia), Birmingham (Alabama), Chattanooga, (Tennessee), and points in South Carolina to Sycamore and Sylacauga, Alabama. It is also authorized to move textile products from Sylacauga, Talladega, Childersburg, and Sycamore (all in Alabama) to points in Tennessee, Georgia, Alabama, and South Carolina. In this case F & B sought further authority to transport general commodities outbound from Sylacauga, Talladega, Childersburg, and Sycamore and inbound to Talledega and Childersburg.

F & B maintains terminals at Sycamore, Birmingham, Atlanta, Chattanooga, and Greenville, South Carolina. It proposed to route all less-than-truckload traffic moving to or from the four points in Alabama through its Sycamore terminals and to provide an overnight service between all points to be served directly. Its application was supported by thirty-six shippers seeking overnight service for less-than-truckload shipments outbound from the four Alabama points (J.S. 68a–70a); it was opposed by twenty-six motor carriers, operating in whole or in part over the routes sought by F & B, which contended that existing service for the points involved was adequate and no further service was needed (J.S. 70a–73a). After a hearing, the Commission's examiner recommended that the application be granted, subject to a restriction here irrelevant (J.S. 20a).

The Commission, although adopting the examiner's principal findings of fact with certain modifications (J.S. 67a), denied the application on the ground that F & B had failed to establish a public need for the proposed service (J.S. 75a). A short time later it vacated *sua sponte* its determination (J.S. 77a) because in its prior report it had "inadvertently failed to give proper consideration to certain pleadings filed" (J.S. 81a).

On July 14, 1965, the Commission issued its report and order on reconsideration; it again denied the application because F & B had not established that the proposed service "would be responsive to a public need" (J.S. 91a). It found that the existing service was adequate, that the two principal carriers serving the four Alabama points frequently provided overnight service, and that no real need for expedited service had been shown (J.S. 90a). F & B's petitions for reconsideration (J.S. 92a–93a) and further hearing (J.S. 78a–79a) were denied.

F & B sued in the district court to set aside and enjoin the Commission's order. On June 24, 1966, a unanimous three-judge court dismissed the complaint. It held that the Commission was free to reach conclusions upon the evidence contrary to those of the examiner; that substantial evidence supported the Commission's decision; and that its determination had a rational basis (J.S. 1a–5a).

ARGUMENT

The question involved in this case—whether there is a need for the particular motor carrier service proposed—has twice been considered by the Interstate Commerce Commission and has been reviewed by a three-judge district court. We submit that the dismissal of appellant's complaint was correct, and that no issue warranting plenary consideration by this Court is presented.

Whether additional motor service will serve the public convenience and necessity is committed to the sound discretion of the Commission. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65. Appellant does not dispute the standards applied by the Commission in exercising this discretion: that the applicant must show by convincing evidence a public need for the proposed operations, and that a necessary element in this showing is the inadequacy of existing service to meet present or future transportation requirements. *Curtis, Inc.* v. *United States,* 225 F. Supp. 894, 898 (D. Colo.), affirmed, 378 U.S. 128; *Quickie Transport Company* v. *United States,* 169 F. Supp. 826, 828 (D. Minn.), affirmed, 361 U.S. 36; *Hudson Transit Lines, Inc.* v. *United States,* 82 F. Supp. 153, 157 (S.D.N.Y.), affirmed, 338 U.S. 802. Rather, it contends that because the examiner would have granted its application, and the Commission accepted his principal findings of fact, it could not reach a contrary conclusion without "specifying in detail the error of the examiner"(J.S. 9). This contention misconceives both the relation between the agency and its examiner, and the nature of the evidence in this case.

Although the thirty-six shippers supporting F & B's application expressed interest in overnight less-than-truckload service to and from the four points, not one of them presented documents (such as freight bills) or testimony showing undue delay or other inadequacy in service. Many of the area shippers had not taken advantage of existing motor carrier services or were not even aware of their extent (J.S. 90a). In contrast, evidence for the protesting carriers showed that the two principal carriers serving the four points frequently offered overnight service and that time in transit was more than adequate for the ordinary traffic requirements of the area. The overall volume of less-than-truckload shipments was relatively low and there were only a few instances of emergency shipments (J.S. 90a). Thus, the Commission properly viewed this evidence as showing not a need for further service, but rather only a desire on the part of shippers to have available as much fast service as possible. And even if conflicting inferences could be drawn, it remains the responsibility of the Commission to resolve the conflict and draw the ultimate conclusions. *Illinois Central R. Co.* v. *Norfolk and Western R. Co.,* Oct. Term 1966, Nos. 15, 17, and 20 (decided November 14, 1966), slip opinion, p. 12.

This function of the Commission is not diminished because its examiner reached different conclusions on substantially the same facts. The responsibility for decision has been vested by Congress in the Commission, not in the examiner (*Radio Commission* v. *Nelson Bros. Co.,* 289 U.S. 266, 285–286); the Commission on review of the examiner's decision has "all the powers which it would have in making the initial decision * * *." Administrative Procedure Act, 5 U.S.C. 1007(a). It need not find that his determination is "clearly erroneous" as a prerequisite to reaching a different conclusion; but rather, it must give the findings the consideration and the effect they deserve in the circumstances of the case. *Universal Camera Corp.* v. *Labor Bd.,* 340 U.S. 474, 492–497. Here there was no issue of credibility and no other evidence which might confer special significance upon the examiner's findings. The only question was the inference to be drawn from those findings in the light of the policies and purposes of the Motor Carrier Act. These, as well as the ultimate conclusions to be drawn, were for the Commission. *U.S.A.C. Transport, Inc.* v. *United States,* 235 F. Supp. 689, 692–693 (D. Del.), affirmed, 380 U.S. 450; *Eagle Motor Lines, Inc.* v. *United States,* 236 F. Supp. 502, 504 (N.D. Ala.).

Moreover, the reasons for the different conclusions drawn by the Commission and by the examiner are adequately disclosed in the Commission's report.[2]

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[2] For example, the examiner relied upon statements of shippers for his conclusion that present service was inadequate (J.A. 11a–12a, 18a). The Commission discounted that evidence in view of the lack of documented support for the statements, and instead characterized them as expressing desire rather than

Since that report is supported by substantial evidence on the record as a whole [3] and clearly reveals the reasons for the ultimate decision, the dismissal of appellant's complaint was proper.

Appellant also contends that the Commission erred when it refused to reopen the record for further hearing because one of the numerous carriers serving the area subsequently reduced its service. But this new consideration on its face obviously falls well short of the highly significant change in conditions involved in the case upon which appellant principally relies, *Atchison, T. & S.F. Ry. Co.* v. *United States,* 284 U.S. 248. See also, *Interstate Commerce Commission* v. *Jersey City,* 322 U.S. 503, 515. Reopening for further hearing is a matter resting in the Commission's sound discretion. *Interstate Commerce Commission* v. *Jersey City, supra,* at 514; *United States* v. *Pierce Auto Lines,* 327 U.S. 515, 535. In light of the evidence in the record as to the service furnished by other carriers (see J.A. 86a–88a), it is apparent that that discretion was reasonably exercised here.

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need (J.A. 84a–86a, 89a–90a; see text, p. 5, *supra*). In addition, the examiner concluded that existing motor carriers had not attempted to meet the needs of the shippers (J.A. 17a); the Commission found that the record as a whole showed no material inadequacy of service (J.A. 91a), and no pattern of existing service deficiencies (J.A. 90a).

[3] Of significance in respect to the relationship between the test on review and appellant's reliance upon the examiner's decision is this Court's comment in the *Universal Camera* case: "The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree." 340 U.S. at 496.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

On Appeal From the United States District Court for the Northern District of Alabama

---

MOTION TO AFFIRM

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On Appeal From the United States District Court for the Northern District of Alabama

---

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the intervening appellees, Alabama Highway Express, Inc., and Baggett Transportation Company, move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 1a-5a, 256 F. Supp. 23) dismissing appellant's suit to set aside an order of the Interstate Commerce Commission (J.S. 91a-92a). In its report and order (J.S. 80a-91a, 99 M.C.C. 258), the Commission's Division 1, acting as an Appellate Division, denied appellant's application for a certificate of public convenience and necessity authorizing operations as a common carrier by motor vehicle of general commodities, over irregular routes between four points in Alabama and points in four southeastern states. On reconsideration, the denial was affirmed (J.S. 91a).

Intervening appellees are common carriers by motor vehicle domiciled at Birmingham, Alabama, and were active protestants to appellant's application for a certificate of public convenience and necessity before the Commission and were intervening defendants and filed supporting brief on behalf of the position of the United States of America and the Interstate Commerce Commission, the principal defendants before the Three-judge court. The extent of the interest of these intervening appellees is of record (J.S. 48a-49a, 50a-51a and 71a and 74a).

Alabama Highway Express, Inc., and Baggett Transportation Company, intervening appellees, adopt completely, and in full, the statement of facts, the argument, and the statement of the law in support thereof submitted by the United States of America and the Interstate Commerce Commission in their Motion to Affirm filed herein.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1966

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FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Alabama

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REPLY TO MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1966

No. 702

FLOYD & BEASLEY TRANSFER CO., INC., *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Northern District of Alabama

---

REPLY TO MOTION TO AFFIRM

Pursuant to Rule 16 (3) of the Rules of this Court, the appellant, Floyd & Beasley Transfer Co., Inc., and intervening appellants, file this their Reply to the Motion to Affirm heretofore filed on behalf of the United States of America, The Interstate Commerce Commission and intervening appellees.

ARGUMENT

The essence of this appeal, as it pertains to the examiner's findings of fact and conclusions, is to contest the position taken by the Interstate Commerce Commission and other appellees that the Interstate Commerce Commission is free to tread where this Honorable Court is forbidden to tread. The appellees say that the Interstate Commerce Commission can reverse, without a specific explanation of error in the facts or a designation of misapplication of law, the detailed findings of fact by the examiner with the mere conclusion that those facts are incorrect.

This Honorable Court, under established precedent, is bound by the findings of a master or a District Court Judge in a non-jury case as through there was a jury verdict and the court will not pry into the evidence or re-evaluate that evidence unless the facts found are contrary to the testimony or based upon misapplication of the law.

The appellants recognize that the Interstate Commerce Commission is due the deference of an expert, but there is an extreme difference in applying the expertise of the Interstate Commerce Commission to the facts after they have been found as opposed to the Commission changing the facts from those found by the examiner in the absence of contrary testimony or misapplication of the law.

The appellants say that the Interstate Commerce Commission does not have that power and unless the examiner's finding of fact is specifically shown from the record to be erroneous or that there is a misapplication of law, those facts found by the examiner are binding upon the Commission.

There is no established law to the contrary and the established law indicates not only that the matter has not been fully considered, but that upon consideration the appellants' contention should be correct.

Your appellants have pointed out above that the weight accorded the findings of a master or judge in a non-jury case is that of a jury verdict. In the West Publishing Company Digest under Appeal and Error Key No. 1017, there are innumerable decisions throughout the country pointing out this great weight of authority. The latest Alabama case of *Walls* v. *Leadway Co-op Mill,* 176 So. 2d 16, 278 Ala. 83, is authority for the proposition that the report of a register on evidence given orally before him is accorded the weight of a jury verdict, and even if from the evidence as a whole it is a matter of doubt as to whether the finding of fact was correct and intelligent persons might entertain different opinions as to the matter, the findings should not be disturbed.

The 1966 Alabama Case *Baggette* v. *Baggette,* 182 So. 2d 898, supports the above proposition as it pertains to evidence heard orally by a trial court and further states that the findings should not be disturbed unless the judgment or decree is plainly and palpably wrong and unjust.

The above propositions of law, for practical purposes, are unanimously in accord throughout the United States. Here appellants say that the report of the examiner is analogous to and should fall within the same propositions of law. If this is not so, there would be no reason for the holding of this Honorable Court in the case of *Federal Trial Examiners Conference* v. *Ramspeck,* D.C. 1952, 104 F.Supp. 34, Aff'd 202 F. 2d 312, reversed on other grounds 73 S. Ct. 570, 345 U.S. 128, 97 L. Ed. 1360, rehearing denied 73 S. Ct. 778, 345 U.S. 931, 97 L. Ed. 872. In the referenced case, this Honorable Court stated that a major purpose of Title 5 USC 1010, which provides, among other things, for the appointment of examiners and for their removal only for good cause by the Federal Civil Service Commission, was to make the hearing examiners *independent* of pressure from agencies whose cases they pass upon.

In the case of *Kerner* v. *Celebreeze,* C.A. NY 1965, 340 F. 2d 736, it was stated that one of the main reasons for making it mandatory for the examiner who has received the evidence to render some form of decision is to provide the Commission with his evaluation of the credibility of the witnesses. The case, *Hickey* v. *Cellebreeze,* D.C. Okl. 1964, 229 F.Supp. 5, pointed out that the trier of facts is to determine *which version* of conflicting evidence is to prevail and weigh evidence accordingly.

The important function of the examiner is further emphasized by the fact that Title 5, U.S.C. Sec. 1007(a) provides in part that:

> "Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within the time provided by rule, such decisions shall without further proceedings then become the decision of the agency."

It stands to reason, therefore, that the examiner holds a position of no minor importance. If it were not so, there would be no basis for the above. Appellants have previously pointed out that the Examiner's opinion should be given serious consideration in accordance with the decision of this Court in the case of *Universal Camera Corporation* v. *Labor Board,* 340 U.S. 474, 492-497.

If this Examiner is to be accorded the important role that the statutes and the laws of these United States vest in him, why then should not the Interstate Commerce Commission which is also a creature of statute be required to recognize the finality of his findings as do the courts? It is respectfully submitted that the very reason that the courts say that they should not interfere with the application of the Commission's expertise and judgment is based upon the fact that the examiner, for the Commission, has viewed the witnesses and has been able to determine, expertly, the facts which in turn determine the case. If this were not so, the proposition would not have been established in the case of *NLRB* v. *National Die-Casting Company,* (C.A. 7 1953) 207 F. 2d 344, that where neither the reporting examiner nor the NLRB saw or heard the witnesses testify and the testimony, taken by the examiner who died before preparing his report, was furnished to the successor examiner after the evidence had been transcribed, the usual advantages enjoyed by the trier of facts in seeing and hearing witnesses and determining credibility were not present and the *Court of Appeals would scrutinize the evidence closely.*

In other words, if, for example, the testimony had been furnished by affidavit as opposed to having been taken orally before an examiner, this Court would be free to examine the evidence on which the Commission arrived at its finding. We think, for these reasons, that the Commission is required, under the mandate of the case of *Dixie Highway Express, Inc., et al.* v. *U. S., et al.*, 242 F.Supp. 1016 (D.C. Miss.), to state with more than ordinary specificity any contrary findings of fact available to it in the record which influenced its decision; that the Commission could not deal with the record throughout its report in vague and nebulous terms or deal with the problem in its entirety in generalities without favoring the report with any facts to be found in the record.

If it were otherwise, what *effective* right of appeal would an applicant or the protestants have from a report and recommended order of an examiner? The existing procedures deny an effective appeal.

When the exceptions are filed to the examiner's report and recommended order, the case is swallowed up in the maw of the great non-entity. It has been firmly established that all of the mental processes of the Interstate Commerce Commission, its internal memoranda, staff recommendations, and instruments are privileged. See *Walled Lake Door,* 31 F.R.D. 258, Sept. 6, 1962 (D.C. Mich.), *Zuzich Truck Lines, Inc.* v. *U. S. et al.,* (D.C. Kan. 1963) 224 F.Supp. 457.

There is no question but that in this instance, as in all others, the case was assigned to an unidentified clerk of the Commission for review and preparation of a report for Division I of the Commission. What the qualifications were of that unidentified individual, or what influenced his opinions or prejudices will never be revealed, and certainly not in comparison with the obvious and superior qualifications and independence of the examiner. After the preparation of the report from Division I by this non-entity, Division I issued its report on March 11, 1965. Such patent error was committed in that report that Division I—Acting as an Appellate Division—of its own motion on March 31, 1965—vacated and set aside the previous report and reopened the case for reconsideration on the existing record. If the Commission acted within its normal routine, the case was again referred to the same unidentified clerk who had written the erroneous report of March 11, 1965.

In the meantime, your appellants had filed their Petition for Further Hearing on June 8, 1965, but again this same division, Division I, Acting as an Appellate Division, denied that petition on July 14, 1965.

On the same day, Division I, Acting as an Appellate Division, after slight alteration to correct the patent error in the report of the Commission of March 11, 1965, issued its report which, for practical purposes, was a verbatim copy of the March 11, 1965, report.

In accordance with the procedures before the Commission, your appellants appealed that decision and in that appeal your appellants were required to go *back* to the same Division I, Acting as an Appellate Division, with its Petition for Reconsideration. Needless to say, on November 12, 1965, Division I, Acting as an Appellate Division, denied the appellants' Petition for Reconsideration. It is presumed that normal procedures were followed and the same non-entity who had written the previous reports also passed on and recommended the denial of the Petition for Reconsideration.

Appellants say that it is inconceivable that an individual would reverse himself from his initial decision and it is extremely doubtful that Division I of the Commission would reverse itself after its initial decision.

It is submitted that by such appellate procedure the appellants have not been accorded due process in the resolution of contested questions by an impartial and disinterested tribunal. See *Amos Treat and Company* v. *Securities and Exchange Commission,* 1962, 306 F. 2d 260. Perhaps, if there had been a right of appeal to another of the divisions of the Commission or to a different body so that a fresh opinion could have been sought as opposed to seeking to overcome a fixed opinion, due process would have been answered.

Certainly due process has not been afforded in this instance where not only has the right of appeal been restricted to the same division in each instance, but there has been no specificity of error afforded by that division to support the basis for overturning the examiner's opinion. A mere assertion in the opinion of the Commission that the Commission had examined all available evidence did not suffice to show on review that the conclusion of the Commission was the result of the application of the Commissions' expertise and judgment. See *State Corporation of Kansas* v. *Federal Power Commission,* (C.A. 8 1953) 206 F. 2d 690, Cert. den. 74 S. Ct. 307, rehearing denied 74 S. Ct. 862. Although it is not required that the Commission give a detailed explanation of its decision, it is required that sufficient reason be given by the Commission for the denial of a certificate in order to permit the reviewing court to determine the basis for its action. See *Commercial Transport Inc.* v. *U.S.,* (D.C. Ill.), 1959, 173 F.Supp. 524, Aff'd 80 S. Ct. 50.

As examples of unsupported change in this case, Division I, Acting as an Appellate Division, chose to discard the findings of the examiner which was supported by the oral testimony of the small shippers (TR 112, 202-452) on the grounds that they were not supported by documentary evidence (70a). Division I, Acting as an Appellate Division, by inference, stated that Baggett offered service that took no longer than second day when the examiner had pointed out that in more than 15% of the shipments, Baggett took three or more days to deliver these shipments (51a, 71a).

Division I, Acting as an Appellate Division, repeatedly referred to Ryder's service (69a, 70a) even though the affidavits filed prior to this report established that Ryder had *abandoned* service. Division I, Acting as an Appellate Division, also chose to ignore the fact that a large number of the shippers routed their shipments to the appellant's terminal in Sycamore (11a) in order to obtain overnight service and that these four towns were almost wholly dependent on motor transportation (17a).

Division I, Acting as an Appellate Division (74a), stated that, "It also appears that many of the shippers are *primarily interested* in outbound transportation of volume, rather than less truckload shipments." (Emphasis added) If the record is examined, only *two* of the thirty-two supporting shippers at the four points were "primarily interested" in truckload service.

On the same page, Division I stated that these shippers "have not tried or are unaware of the variety of services available from regular route as well as irregular route protestant carriers." In this connection, the only carriers authorized to serve any of the four base points were Malone, Bowman, Dixie Highway, Baggett, Alabama Highway, Georgia Highway-B.C., Parish Dray Lines, Anniston-Talledega and Ryder. Bowman, Malone, Alabama Highway and Parish established in their testimony that they transported truckload shipments only. Dixie Highway had a 5,000 pound minimum restriction and withdrew its opposition to the application. In addition, it was able to serve only Talledega and Sylacauga. Ryder was authorized to serve the points of Childersburg, Sylacauga, and Sycamore, but according to the affidavit filed with the Commission prior to the last order of Division I, it has abandoned service at those points. Anniston-Talledega handled LTL shipments, however it served between Talledega and Birmingham only.

Baggett was authorized to serve Childersburg and Sylacauga only but their service was repeatedly condemned by practically every one of the shippers (TR 340-342, 1014, 655, 516-517, 896-897, 184, 381-382, 481-483, 752, 880, 1008-1010, 132, 381-382, 551-552, 691, 695-696, 708).

Georgia Highway-B.C. holds authority to serve all four of the points and does render some service with reference to LTL shipments, however, its service was also repeatedly condemned by all of the witnesses who have used their service. (TR 551, 561, 548, 619, 646, 642-643, 997, 986). In addition, like Baggett, it cannot serve any points except Atlanta and Chattanooga.

In fact, when Georgia Highway introduced its traffic exhibit, the reliability of the underlying documents were questioned. The delivery date indicated on the documents, which was often penciled in by the drivers, was challenged by the shipper witnesses. Witness Roberts, who maintained that Georgia Highway required between two and seven days to provide service from Atlanta, commented as follows on a bill purporting to show overnight service from Atlanta:

> "This (shipping bill) shows overnight service and in the 15 years I have been in the parts business, I have never received overnight service from Georgia (Highway). I don't know how the date got there as overnight. I have never received anything overnight." (TR 627)

It is obvious from all the above, and they are just a few among many, that there is no basis for the statement in the brief of the United States and the Interstate Commerce Commission (page 6) that "Here there was no issue of credibility and no other evidence which might confer special significance upon the examiner's findings."

It is submitted that it is these various things such as the above issue of credibility (for it is certain that all of these small shippers are not going to lie on the stand) that the examiner observed, adequately summarized and formed the basis for his findings of fact. The findings should not be discredited lightly with broad conclusions and certainly not without specific findings from contrary testimony in the record. The appellants submit that the examiner's findings of facts and conclusions should have been treated by the Commission and should be treated by the Court the same as a jury verdict; they should not have been changed except upon specific example showing either the misapplication of the law or facts found to be contrary to the testimony. The deference owed an expert tribunal should not be allowed to slip into what amounts to judicial inertia.

In the Motion to Affirm filed on behalf of the United States, and the Interstate Commerce Commission (page 7) comment is made that:-

> "Appellant also contends that the Commission erred when it refused to reopen the record for further hearing because *one* of the numerous carriers serving the area subsequently reduced its service." (Emphasis added)

Appellants submit that the comment is misleading, and is not an accurate statement of your appellants' contention of error.

It has been pointed out above and in the affidavits to the Commission that, at the time of a hearing, there were a maximum of three carriers offering LTL service to each of the four points here involved. Of these, Dixie Highway

Express which was authorized to serve between Talledega and Sylacauga on the one hand, and Atlanta on the other, was subject to a 5,000 pound minimum restriction. This carrier later withdrew its protest and stated that it thought Floyd & Beasley should be granted the authority.

Baggett Transportation Company is authorized to serve between Childersburg and Sylacauga, on the one hand, and Atlanta and Chattanooga on the other. That service was condemned, as pointed out above, by all of the shippers at those two points. Anniston-Talledega was authorized to serve between Talledega and Birmingham, only, and its services entailed delay through interchange over the Birmingham gateway. Georgia Highway served all four points but its service was also condemned. Ryder Truck Lines was authorized to serve the points of Childersburg, Sylacauga and Sycamore and was, in fact, offering the only service that would approach reliability. This is the carrier that later *abandoned* service at the points.

The fact that Dixie Highway had withdrawn its protest and Ryder had abandoned service was pointed out in the affidavit. It was pointed out in the affidavit that Alabama Highway had promised to institute LTL service at the four points (49a) but had failed to do so. It was pointed out in that affidavit that none of the protestants had improved their service or tendered any service different in character or kind from that available at the time of the hearing.

Thus, Childersburg and Sylacauga were left with the unreliable service of Baggett Transportation Company and Georgia Highway between those points on the one hand and Chattanooga and Atlanta on the other. There was no single line service between the two points and South Carolina. Sycamore was left with no LTL service by protestants to any of the destinations. Talledega was left with direct service to Atlanta and Chattanooga by one carrier only.

All the above facts were given to the Commission by affidavits attached to the Petition for Further Hearing and those affidevits were in the hands of Division I, Acting as an Appellate Division, prior to the issuance of its report on July 14, 1965. In that report, Division I, Acting as an Appellate Division, cited the service of the above carriers, and especially Ryder, as affording adequate and satisfactory service to the points involved. The real effect of the order of Division I dated July 14, 1965, is that the Commission does not think small shippers in the four points, because they are small shippers, are *entitled* to the same service that the large shippers have available to them. Your appellants say that there has been an arbitrary abuse of discretion by the Commission under the circumstances. The National Transportation Policy certainly makes no distinction on such grounds. That policy, in part, is as follows:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; . . ." (Preface to Title 49, USC, Chapter 1)

The Motion to Affirm should be denied.

Respectfully submitted,

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